Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement

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Antitrust law makes a fundamental distinction between unilteral conduct and concerted action to restrain trade. Concerted action is treated more harshly because it creates more risks of anticompetitive harm. Because the law encourages individual firms to compete aggressively, antitrust law does not proscribe unilateral conduct unless it threatens actual monopolization of a market. Current antitrust law treats all tying arrangements as concerted action under Section One of the Sherman Act.

Professor Leslie argues that most tying arrangements are essentially unilateral, not concerted. By condemning unilaterally imposed tying arrangements as concerted action, tying cases create significant doctrinal inconsistencies across antitrust law. The Article analyzes the structure of American antitrust law, its legislative history, and economic theory to conclude that courts should distinguish between unilateral and concerted tying arrangements and that only the latter should be condemned under Section One. Finally, the Article proposes a fundamental reorganization of all tying law that would insure doctrinal consistency while prohibiting anticompetitive tying arrangements and protecting those tying arrangements that are either benign or pro-competitive.

I. INTRODUCTION

Antitrust law reveres substance over form.[1] But in the doctrine that emerges from antitrust cases involving tying arrangements, form reigns supreme. A tying arrangement exists when a seller refuses to sell one product, "the tying product," unless the buyer also purchases a second product, "the tied product." Current tying law does not recognize that a tie-in can be imposed either unilaterally or through concerted action. Yet this distinction is critical because antitrust law treats concerted action more harshly than unilateral conduct. Nevertheless, courts treat all tying arrangements as concerted action, reasoning that all tie-ins involve an agreement between two parties in the form of the purchase contract between the buyer and seller. This monolithic approach of treating all tie-ins as concerted action fundamentally misconstrues the nature of unilaterally imposed tying arrangements because in substance such tying arrangements are quintessential

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[1] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 772 (1984) (rejecting intra-enterprise conspiracy doctrine in antitrust because it "looks to the form of an enterprise's structure and ignores the reality").

single-firm conduct. Tying arrangements imposed by a single seller, not operating in concert with any competitors or other businesses, should not be evaluated as concerted action under Section One of the Sherman Act; rather, unilaterally imposed tying arrangements should be treated as unilateral conduct under Section Two of the Sherman Act or Section Three of the Clayton Act. Correctly characterizing the substance of each tying arrangement will restore doctrinal consistency to antitrust law and insure that anticompetitive tie-ins are condemned, while protecting beneficial or benign tying arrangements.

Part II lays out the overall structure of American antitrust jurisprudence, which draws a critical distinction between unilateral and concerted conduct. Section One of the Sherman Act proscribes concerted trade restraints if they are unreasonable, while Section Two of the Sherman Act proscribes unilateral conduct, but only if it creates, maintains, or threatens an actual monopoly through anticompetitive means. Thus, unilateral conduct receives greater protection under antitrust laws than does concerted action. Part II explains how the unilateral-concerted dichotomy, which is critical throughout antitrust law, is not applied to tying arrangements. Under existing precedent, all tying arrangements are evaluated under Section One of the Sherman Act. The current case law makes no inquiry into or distinction based on how many parties are imposing the tying arrangements. This Article argues that there are, in fact, two types of tying arrangements: unilateral tying arrangements and concerted tying arrangements. Courts should determine which type of tying arrangement is at issue in any given case in order to decide whether the trade restraint should be analyzed under Section One or Section Two of the Sherman Act or Section Three of the Clayton Act.

Part III explains that although some courts have explicitly treated tying arrangements as concerted action because there is a contract between a seller and a buyer, there are several persuasive arguments against evaluating unilaterally imposed tying arrangements as concerted action under Section One of the Sherman Act. Part III explains that although a contract is legally a form of agreement, not every contract embodies the type of concerted action the Sherman Act was intended to reach. First, the Supreme Court has eschewed a literal approach in many aspects of antitrust jurisprudence, including whether every contract is necessarily an agreement for antitrust purposes. Second, the Sherman Act does not proscribe contracts in general, but only bans contracts in restraint of trade. To determine whether a contract is in restraint of trade, one common inquiry is whether the parties to the contract share a mutual intent to restrain trade. To the extent that the buyer in a tying arrangement does not desire to suppress competition, this counsels against concluding that unilaterally imposed tying arrangements constitute contracts in restraint of trade for Section One purposes. Furthermore, the legislative history of the Sherman Act does not support the argument that Congress intended sales contracts between buyer and seller to be within the reach of Section One. Finally, Part III concludes by demonstrating the number of anomalies that are created within Section One by including unilaterally imposed tying arrangements within its reach.

Part IV argues that unilaterally imposed tying arrangements are more properly considered as unilateral restraints, evaluated under either Section Two of the Sherman Act or Section Three of the Clayton Act. It begins by noting that the current test for evaluating tying does not require proof of an injury to competition; rather, a plaintiff need only show that a "not insubstantial" volume of commerce in the tied product is affected. Such a low standard for liability is arguably inconsistent with the bulk of antitrust law, which requires proof of injury to competition, usually measured in terms of market share. This low standard is certainly inconsistent with Section Three of the Clayton Act, the only explicit statutory prohibition of tying arrangements in federal antitrust law. Part IV then argues that the market power requirement of current tying doctrine is more consistent with the structure of Section Two than Section One. Furthermore, evaluating unilaterally imposed tying arrangements under Section One creates inconsistencies with Section Two conduct and Section Three jurisprudence. Part IV also explains why analyzing unilaterally imposed tying arrangements under Section Two makes sense of leveraging theory as a whole.

Part V shows how analyzing unilaterally imposed tying arrangements under Section Two of the Sherman Act or Section Three of the Clayton Act achieves doctrinal consistency while permitting beneficial tie-ins and proscribing anticompetitive tie-ins. Removing unilaterally imposed tying arrangements from Section One scrutiny will necessarily mean that some currently proscribed tying arrangements would escape antitrust liability. However, there would not be a tying free-for-all. Like all unilateral restraints, unilaterally imposed tying arrangements are subject to Section Two liability if they threaten, create, or maintain a monopoly. This is a fairly high threshold for liability, which means that many tying arrangements that are harmless or beneficial to consumers would no longer be proscribed. To the extent that Congress believed that tying arrangements were more pernicious than other forms of unilateral conduct and enacted specific legislation condemning them, Section Three of the Clayton Act should be the statute of first resort in tying cases. Section Three of the Clayton Act employs a higher standard of liability than current Section One tying law, but a lower standard than Section Two. As such, it represents a reasonable middle ground, disregarding those tying arrangements that affect a "not insubstantial" volume of commerce but do not seriously threaten competition, while condemning those tying arrangements that substantially lessen competition but do not yet threaten actual monopolization.

Finally, Part VI shows how tying arrangements, both unilateral and concerted, should be evaluated in a manner that restores the critical inquiry into whether an antitrust defendant has engaged in concerted action. If a tie-in is challenged under the Sherman Act, then unilaterally imposed tying arrangements should be evaluated under Section Two, while concerted tying arrangements should continue to be analyzed under Section One. Both unilateral and concerted tying arrangements can be challenged under the Clayton Act. When a tie-in is challenged under Section One, the legal test for judging concerted tying arrangements should be reformulated to parallel the Section One test applied to all other concerted conduct. Part VI lays out what specific elements should be required for establishing that a tying arrangement violates the antitrust law, depending on whether the tying arrangement is being judged under Section One or Section Two of the Sherman Act or Section Three of the Clayton Act.

II. DISTINGUISHING BETWEEN UNILATERAL AND CONCERTED CONDUCT

A. *The Distinction Between Unilateral and Concerted Activity in Antitrust Law*

The Sherman Act establishes a two-front approach to anticompetitive conduct. Section One of the Sherman Act addresses anticompetitive conduct that results from concerted action.[2] Section One concerns only concerted activity between separate business entities: "[U]nilateral activity by a single firm cannot be reached via this section."[3] If there is no agreement, there is no case under Section One.

Section Two addresses unilateral conduct to maintain or acquire a monopoly or to attempt monopolization.[4] A cause of action for monopolization requires monopoly power in a relevant market that has been acquired or maintained through anticompetitive conduct.[5] Attempted monopolization requires specific intent to monopolize a market, anticompetitive acts taken to that end, and a

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[2] Section One of the Sherman Act provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994).

[3] Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 286 (5th Cir. 1978) (citations omitted).

[4] Section Two of the Sherman Act provides, in relevant part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (1994).

[5] *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

dangerous probability of success.[6] The tests for each cause of action under Section Two are designed to insure that a business, acting unilaterally, has sufficient latitude to compete aggressively in a free market. As such, the Supreme Court has repeatedly explained that "[Section Two] makes the conduct of a single firm unlawful *only* when it actually monopolizes or dangerously threatens to do so."[7]

The Sherman Act does not specify what precise trade restraints are proscribed.[8] Rather, through over a century of case law, courts have developed a list of restraints condemned by the Sherman Act. Although some anticompetitive conduct can violate both sections of the Sherman Act, most trade restraints are usually categorized as either Section One or Section Two restraints. Thus, concerted action—such as price fixing, territorial restraints, and bid rigging—is evaluated under Section One. And unilaterally imposed trade restraints—such as predatory pricing, price squeezes, and denial of access to essential facilities—are considered under Section Two.

Whether or not a restraint is treated under Section One or Section Two has practical consequences because each section employs a different threshold for liability. Concerted action need only be judged "unreasonable" to violate Section One. Section Two proscribes certain unilateral conduct, which must be more than merely unreasonable; it must create, maintain, or threaten actual monopolization before it violates the Sherman Act. Thus, Section One and Section Two conduct are evaluated under different standards.[9]

This distinction between unilateral and concerted action represents the heart of the Sherman Act's structure. Federal courts have repeatedly noted that this distinction is both "critical" to the entire structure of American antitrust law[10]

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[6] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[7] *Id.* at 459 (emphasis added).

[8] Thus, despite the fact that some trade restraints are widely recognized as illegal, the Sherman Act does not mention price-fixing agreements, division of territory, predatory pricing, or any other specific restraint by name. In contrast to the Sherman Act, the Clayton Act explicitly prohibits tying arrangements. The Clayton Act was enacted in 1914 in response to congressional concerns that anticompetitive conduct was thriving despite the Sherman Act. In particular, Congress was vocally upset over the Supreme Court's early opinions interpreting the Sherman Act. The Clayton Act was intended to shore up the Sherman Act. Despite the Clayton Act's explicit prohibition on tying arrangements, most tying arrangement cases are brought and evaluated under Section One of the Sherman Act. *See infra* notes 384–86 and accompanying text, comparing different standards for evaluating tying arrangements under Section One of the Sherman Act and Section Three of the Clayton Act.

[9] *See* Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1567–68 (11th Cir. 1991); Union Carbide Corp. v. Montell, 944 F. Supp. 1119, 1147 (S.D.N.Y. 1996) (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767–69 (1984)).

[10] Fisher v. City of Berkeley, 475 U.S. 260, 266 (1986); Miller v. Hedlund, 813 F.2d

and "fundamental in deciding whether a cause of action exists."[11] Pursuant to this dichotomy between concerted and unilateral behavior, concerted action is to be "judged more sternly than unilateral activity."[12] Because a single firm can engage in anticompetitive conduct so long as it does not threaten monopolization, activity that (if concerted) would be illegal under Section One, is permitted under Section Two (if it is unilateral). Thus, correctly labeling challenged conduct as unilateral or concerted can often determine whether the conduct violates federal antitrust laws.

The Sherman Act's distinction between concerted and unilateral conduct makes economic sense because the former is uniquely dangerous to a competitive marketplace. The Supreme Court has explained:

> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.[13]

Whereas concerted activity is inherently suspect, conduct by a single firm is given greater latitude because "intense antitrust scrutiny . . . would heighten 'the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.'"[14] Antitrust law recognizes that business needs room to maneuver and to innovate. Such innovation can be in terms of marketing and

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1344, 1349 (9th Cir. 1987); *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) (stating that there is a "basic distinction" between unilateral and concerted action).

[11] Cohen v. Primerica Corp., 709 F. Supp. 63, 65 (E.D.N.Y. 1989); *see also* SCFC ILC, Inc. v. Visa U.S.A., Inc., 819 F. Supp. 956, 979 (D. Ut. 1993) ("This is the structure of the Sherman Act. The structure may be arbitrary. It may or may not be economically unsound. It is, however, the law."). Some commentators have criticized this distinction. *See, e.g.*, Thomas A. Piraino, Jr., *The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution*, 63 NOTRE DAME L. REV. 1, 10–11 (1988) ("The distinction . . . between unilateral and concerted conduct is simply illogical.").

[12] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984); *see also* Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988) ("[T]he Sherman Act treats concerted action more harshly than unilateral behavior[.]"); Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674, 677 (S.D.N.Y. 1987) (stating that the distinction between unilateral and concerted activity "imposes a stricter standard on the conduct of concerted activity").

[13] *Copperweld*, 467 U.S. at 768–69.

[14] *Jeanery*, 849 F.2d at 1152 (quoting *Copperweld*, 467 U.S. at 768).

packaging, as well as creating new products.[15] This is the essence of a free market economy: businesses woo consumers through the complex, iterative process of competition. In short, courts should not be "subjecting the day-to-day activities of a single firm to antitrust scrutiny[,]"[16] lest individual firms be deterred from competing vigorously, as the antitrust laws intend.[17]

But the Sherman Act, while it protects the ability of single firms to adopt unilateral policies, does not give a firm unfettered discretion to compete in any manner it chooses. The Section One-Section Two dichotomy of the Sherman Act recognizes that unilateral conduct is dangerous only when it threatens monopoly.[18] In short, relaxing regulation of unilateral conduct to give individual firms latitude to compete does not grant them permission to monopolize.[19]

By treating unilateral and concerted action differently, the Sherman Act creates a gap whereby some conduct that would be illegal if agreed to between competitors is perfectly legal when done unilaterally. Thus, much anticompetitive conduct that is illegal when performed in combination is permitted when done by a single seller even though such unilateral conduct is still technically anticompetitive.[20] This is simply the cost of allowing individual

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[15] *See* Eastman Kodak v. Image Technical Servs., Inc., 504 U.S. 451, 478–79 (1992); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984); *see also infra* notes 349–54 and accompanying text.

[16] William S. Brewbaker III, *Antitrust Conspiracy Doctrine and the Hospital Enterprise*, 74 B.U. L. REV. 67, 71 n.16 (1994).

[17] *Cf.* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 116 (1986) ("[I]t is in the interest of competition to permit dominant firms to engage in vigorous competition[.]") (citation omitted); Matsushita Radio Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986). Regardless of whether a business is found liable for treble damages, even the process of antitrust scrutiny can chill business activity. In debating the Sherman Act, Senator Morgan noted that the law "ought not to be a breeder of lawsuits. If there is any one duty we have got higher than another in respect of the general judiciary of the United States, it is to suppress litigation and have justice done without litigation as far as we can." 21 CONG. REC. 3145, 3149 (1890) (statement of Sen. Morgan), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 279, 288 (Earl W. Kintner ed., 1978) [hereinafter LEGISLATIVE HISTORY]. Analyzing the reasonableness of any given restraint is a cumbersome process that should not be undertaken unless necessary. When a seller has unilaterally imposed a restraint, courts should not partake in analyzing the reasonableness of that restraint unless it is the result of concerted action.

[18] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[19] While unilateral conduct is afforded deference, it is not given free rein. Unilateral conduct that is generally legal can be forbidden by the Sherman Act when it is done by a monopolist, or a business attempting to achieve monopoly power. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[20] As the Third Circuit has recognized, "the Sherman Act does not make unlawful the entire universe of anticompetitive conduct. It does not proscribe anticompetitive unilateral

businesses room to experiment, make mistakes, and, perhaps, acquire market share. As a result, the critical first juncture in most antitrust analysis is whether the challenged conduct is unilateral or concerted. The answer to this question determines whether a court will apply the framework of Section One or Section Two, which in turn determines how much latitude a court will allow the firm whose actions are challenged.

B. *Applying the Sherman Act's Unilateral-Concerted Dichotomy to Tying Arrangements*

Current antitrust law does not recognize a distinction between unilateral and concerted tying arrangements. Nonetheless, like other trade restraints, tying arrangements can be categorized as either unilateral or concerted. A unilateral tying arrangement exists when one seller, acting alone, decides that she will not sell her tying product unless the prospective buyer also purchases the designated tied product.[21] A concerted tying arrangement, on the other hand, is created when two sellers agree to jointly impose a tying arrangement.[22] Just as there is a distinction between concerted and unilateral anticompetitive conduct in antitrust law generally, concerted and unilateral tying arrangements should receive disparate antitrust scrutiny.

1. *Unilateral Tying Arrangements*

A tying arrangement is "defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[23] Under this classic definition of a tying arrangement, the tie-in appears unilaterally imposed.[24] The seller does not conspire or agree with any other seller to impose the tie-in. Rather, the seller unilaterally decides to tie two products together in much the same way that a seller unilaterally decides what

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conduct that falls shy of threatened monopolization." Fineman v. Armstrong World Indus., 980 F.2d 171, 205 (3d Cir. 1992).

[21] This Article focuses on the most traditional form of a tying arrangement whereby a seller "forces" a buyer to purchase two products. Another form of tie-in exists when Seller A announces that she will only sell Product X to consumers who agree not to purchase Product Y from Seller B. Seller A does not demand that consumers actually purchase Product Y from Seller A; they simply cannot purchase it from Seller B.

[22] *See infra* Part II.B.2.

[23] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958) (footnote omitted).

[24] The origin of this language and how it misleadingly suggests a lone seller is discussed in Part II.B.3.

price to charge for a product.

Unilateral tying arrangements are condemned because of their effect on competition. According to traditional leverage theory, a lone seller with market power in a tying product may attempt to impose a tie-in as a way to leverage market power from one market to another.[25] The seller who controls the tying product, so the argument goes, can refuse to sell the tying product unless the consumer also purchases the tied product, thereby diminishing competition on the merits for the tied product.[26] Traditional theory holds that tie-ins eliminate competition because the consumer must take the tied product, regardless of its quality, in order to obtain the tying product.[27]

Independent of its effect on competition in the market for the tied product, a unilaterally imposed tying arrangement can also be used to price discriminate.[28] For example, suppose the Xymox Corporation manufactures and sells both copiers and copy paper. It sells copiers to two consumer profiles, a large paper-intensive business (such as a law firm) and a small business that has fewer copying needs (such as a real estate office). The law firm cannot operate without the ability to do large amounts of copying, and therefore it values the copier more than does the real estate firm, which does less copying. Suppose the law firm were willing to pay $50,000 for a decent copier, whereas the real estate firm is willing to pay $5,000.[29] Ideally, Xymox would like to charge the law firm $50,000 and the real estate firm $5,000. However, it cannot. Not only would such blatant price discrimination run afoul of the Robinson-Patman Act, but there is a significant risk of arbitrage because the real estate firm could buy the copier for $5,000 and then sell it to the law firm for $30,000, a beneficial arrangement for everybody but Xymox. Xymox's dilemma is to find a way to price its copiers so that it does not lose sales to low-volume users, such as the real estate firm, but still extracts a significant amount of the consumer surplus

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[25] *See infra* notes 37–59 and accompanying text.

[26] *See Northern Pac.*, 356 U.S. at 6.

[27] Even if both the tying product and the tied product are competitively priced, the tying arrangement gives the seller, in effect, two sales where otherwise she might only have made one. Thus, while the seller does not necessarily receive supra-competitive profits, she nonetheless earns competitive profits on a greater dollar value of transactions and thereby increases her net profits.

[28] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 478–79 (1992); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14–15 (1984); ROBERT BORK, THE ANTITRUST PARADOX 376–78 (1978); RICHARD A. POSNER, ANTITRUST LAW 173–74 (1976); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926 (1979) ("A tie-in makes sense only as a method of price discrimination."); Kurt A. Strasser, *An Antitrust Policy for Tying Arrangements*, 34 EMORY L.J. 253, 276–77 (1985).

[29] If the market price for copiers were higher, the real estate firm would find it more cost-beneficial to take its copying to an outside vendor.

from high-volume users, such as the law firm. Tying may do the trick. Xymox can impose a tying arrangement between its copiers and its copy paper, whereby purchasers of Xymox copiers must exclusively use Xymox paper. Xymox can then price its copiers at $4,000 and its paper at a supra-competitive price, say 10¢ per sheet. The low-volume user, who does not use much paper, will end up spending $5,000 over the life of the copier. Conversely, the high-volume user, who uses substantial quantities of copy paper, will end up paying closer to $50,000 for the copier and paper supplies over the life of the copier. Both low- and high-volume users will find the arrangement cost-beneficial and Xymox will extract maximum consumer surplus from different consumer groups. However, because both sets of consumers see the same shelf-price for their copiers, there is no blatant price discrimination. Additionally, there is no risk of arbitrage because the low-volume user cannot sell her copier to a high-volume user in a mutually beneficial trade; thus, the tying-implemented price discrimination is not easily circumvented.[30]

A seller can also employ a unilateral tying arrangement to evade a price ceiling on the tying product.[31] For example, suppose a government—federal, state, or local—imposes a price ceiling of $10 on Product X, which would otherwise sell for $15 in a competitive market. A seller could not then directly charge $15 for X, but she could achieve the same result by implementing a tie-in whereby a consumer desiring X must also purchase Product Y. The seller then increases the price of Y, the tied product, to five dollars greater than its competitive price. As a bundle, X and Y are sold at a price that is equivalent to the price that would be paid for both goods in a competitive market without price regulation.[32] This tying arrangement is not intended to extend the seller's market power from the market for the tying good into the tied product market; rather, it provides a mechanism to circumvent governmental price regulation.[33]

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[30] While tie-ins can theoretically be used to effect price discrimination, there are reasonable arguments for why tying law should not be used to police price discrimination. *See* 9 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1711f3, at 134 (1991). First, it is not the most effective tool against such conduct. Tying law is more concerned with leveraging between markets and legal tests are designed to address this problem, not price discrimination. Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 33 (1957) ("To make a tie-in illegal in the price discrimination situation is arbitrary, for it resolves a very complicated problem in a manner totally different from the law directly concerned with price discrimination."). Second, the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. §§ 13–13b, 21a (1994), is specifically tailored to deal with price discrimination and is, therefore, a more appropriate tool.

[31] *See* 9 AREEDA, *supra* note 30, ¶ 1712d, at 141–42; Bowman, *supra* note 30, at 21–23.

[32] Additionally, the seller has sold two items instead of simply the tying product at the competitive price that would have been prevailing but for the price ceiling.

[33] *See* Bowman, *supra* note 30, at 23. Similarly, a tying arrangement can be a means to

In sum, tying arrangements imposed by a single seller are condemned because of concern that such restraints suppress competition for the tied product, facilitate price discrimination, and can be used to evade price regulations.[34] Whether a tying arrangement represents an effective means to achieve these ends will largely depend on the seller's market power[35] and the existence of market imperfections.

2. *Concerted Tying Arrangements*

The above arguments against tying arrangements presume that tie-ins are imposed by a single seller even though tie-ins can be imposed by multiple sellers. Given this presumption, it is ironic that current antitrust law treats all tying arrangements as inherently concerted action evaluated under Section One of the Sherman Act.[36] This Article argues that a tie-in imposed by a single seller is not concerted, but unilateral. Concerted tying arrangements are fundamentally different from unilaterally imposed tying arrangements. And just as the Sherman Act recognizes in general that concerted action is inherently more dangerous than unilateral action, concerted tying arrangements similarly present many more anticompetitive risks than do unilaterally imposed tying arrangements.

Concerted tying arrangements come in at least three forms. First, two suppliers of tying and tied products (*i.e.*, each supplier sells both products) may agree to jointly impose a tying arrangement as a variant of horizontal price fixing. Second, a supplier of a tying product and a supplier of a tied product may agree that the first supplier will condition all sales of the tying product on the purchase of the tied product from the second seller. Third, a concerted tying arrangement exists when a dominant supplier convinces alternative suppliers of the tying product not to sell the tying product to consumers attempting to circumvent the dominant seller's tying arrangement.

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evade a cartel. *See* RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 809–10 (2d ed. 1981).

[34] Some courts and commentators also condemned tying arrangements as a barrier to entry that diminishes competition. *See* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 509 (1969); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 10.6b1, at 372–73 (1994).

Another theoretical use of tying arrangements that is related to price discrimination is metering. Arguably, the tying arrangements in *International Salt Co. v. United States*, 332 U.S. 392 (1947), and *International Business Machine Corp. v. United States*, 298 U.S. 131 (1936), were metering tie-ins. In many instances, however, tie-ins are not an appropriate metering tool. *See* Bowman, *supra* note 30, at 35 (stating that tie-ins are an inappropriate metering tool when more than one product is tied).

[35] *See infra* notes 333–35 and accompanying text.

[36] *See infra* notes 115–16 and accompanying text.

a. *Concerted Tying Arrangements Between Competitors*

Perhaps the most dangerous form of concerted tying arrangement exists when competitors—each of whom traffic in both the tying and tied products—collude and agree that each supplier will tie two products together. A concerted tying arrangement between competitors is basically a form of horizontal price-fixing.[37] This can be seen on several levels. First, to the extent that a tying arrangement represents a backdoor way of increasing cost to a consumer—by forcing consumers to buy two products instead of one—a concerted tying arrangement is fundamentally a joint price increase. By way of a hypothetical, consider two sellers, A and B, both of whom sell two separate products, X and Y. A and B would like to fix the price of X at supra-competitive levels, but fear that they would be easily caught if they had to continually meet to change the fixed price in response to changing market conditions. Also, A and B would worry about raising suspicions if their prices moved in unison. As an alternative to explicit price fixing, A and B may agree to tie all sales of X to sales of Y. In doing so, they have not fixed the price of X, but they have effectively increased the net profits received from each sale of X by coupling it with Y, especially if Y is a high-ticket item.

Second, tying arrangements facilitate joint efforts to stabilize prices at higher levels. Tying arrangements create noise that makes it more difficult for consumers to determine true long-term prices and therefore create a significant barrier to comparison price shopping.[38] In many instances, it may be more difficult for consumers to calculate the cost of a bundle of goods than the tying product alone. This is particularly true when the tied product is a service, which does not have an up-front cost.[39] Depending on the level of noise created, the concerted tying arrangement can have similar effects to horizontal price-fixing because if two competitors agree to impose tying arrangements, there may be less price competition for the tied product.[40] Also, a tying arrangement can be used to obscure a traditional price-fixing scheme because the sellers can

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[37] *See* HOVENKAMP, *supra* note 34, § 10.4b, at 366 ("One of the most plausibly anticompetitive uses of tie-ins is to facilitate cartelization or other coordination of prices in the market for the *tying* product."); *see also* 9 AREEDA, *supra* note 30, ¶ 1703a, at 33 (stating that tie-ins "may ease tacit coordination among oligopolists").

[38] *See* 9 AREEDA, *supra* note 30, ¶ 1712f, at 144–45 (demonstrating how tie-ins can be used to "[d]eceptively understate price").

[39] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 473–76 (1992). However, the service costs may be determinable when a warranty is bundled with a durable good.

[40] *See* 9 AREEDA, *supra* note 30, ¶ 1707c, at 80 (stating that tie-ins may reduce incentives for price competition in an oligopolistic market).

simultaneously impose tie-ins but charge different prices for the tying and tied product (for example, Seller A charges a higher price for the tying product than Seller B but a lower price for the tied product), whereby the price for the bundle is the same. Buyers will not see the same price for the tying product and will be less likely to detect the price-fixing.

On a similar note, a concerted tie-in can facilitate cartelization of the tied product by providing a mechanism to detect cheating by cartel members. Tying case law contains examples of tie-ins whereby the consumer was required to purchase the tied product from the tying seller only if no other supplier were selling the product for less.[41] Scholars have argued that this provision essentially converted consumers into cartel police who would report to the dominant tying seller if any suppliers were selling the tied product for below the market price, which was fixed by the cartel.[42]

Finally, a concerted tying arrangement between competitors could be used to eliminate a mutual foe. Suppose Sellers A and B both supply Products X and Y, but are facing potential or actual competition from Seller C in the market for Y, but not X. Through a concerted tying arrangement, A and B can decrease the competitive threat posed by C. If A and B each require every purchaser of X to also purchase Y, there may not be enough residual demand for Y for Seller C to remain in business.[43] Even if A and B cannot force C from the market, it is rational to continue the concerted tying arrangement because it imposes a significant barrier to entry for any new firms.[44]

Each of these concerted efforts at tying is inherently more harmful to competition than its unilateral counterpart. By agreeing to engage in simultaneous tying arrangements, competitors can provide air cover to each others' tying arrangements. In a competitive market, if Seller A were to impose a tying arrangement, consumers could buy the tying product from Seller B without

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[41] *See, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 7 n.6 (1958); International Salt Co. v. United States, 332 U.S. 392, 394 n.5 (1947).

[42] *See* F. Jay Cummings & Wayne E. Ruhter, *The* Northern Pacific *Case*, 22 J.L. & ECON. 329 (1979); HOVENKAMP, *supra* note 34, § 10.6b3, at 374–75.

[43] Such would be the case if there were a minimal scale of production necessary to conduct business profitably and the concerted tying arrangement had the effect of driving independent demand for the tied product below this minimum threshold. Similarly, A and B could raise C's relative costs if economies of scale are achievable. *See generally* Thomas G. Krattenmake & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

[44] *Cf.* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 513 (1969) (White, J., dissenting) ("[T]he practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market."); Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 605 (1953).

the requirement of purchasing the tied product.[45] The existence of alternative suppliers of a tying product who are willing to sell that tying product alone would substantially undermine the force of any unilaterally imposed tying arrangement, in the same way that a unilaterally announced increase in price is likely to be ineffective if one's competitors do not follow suit. If, however, other sellers agree not to sell the tying product alone, all sellers are then able to impose a profit-maximizing tying arrangement, which would otherwise be easily circumvented in a free market. Thus, to the extent that consumers do not want the tied product or they desire to purchase it independently, an agreement between two competitors to impose a tying arrangement decreases consumer welfare more than any competitor imposing a tying arrangement unilaterally.[46]

Similarly, in the context of a joint tie-in intended to eliminate an independent supplier of the tied product, the concerted action makes the scheme more likely to succeed and is, therefore, more dangerous to competition. For example, take the previous hypothetical in which Sellers A and B both sell Products X and Y, Seller C sells only Product Y, and Seller A wants to eliminate Seller C as a competitor in the market for Y. If Seller A unilaterally imposed a tying arrangement between X and Y in an effort to drive Seller C from the market for Y, consumers could still purchase X from Seller B and Y from Seller C. By enlisting Seller B in its plan, Seller A's tie-in scheme to eliminate Seller C as a competitor becomes much more viable.

In sum, the concerted tying arrangement in each of these scenarios is more injurious to competition than the same plan implemented unilaterally by a lone seller.

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[45] *See Northern Pac.*, 356 U.S. at 7 ("[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself.").

[46] In theory, a concerted tying arrangement between competitors should decrease consumer welfare by the same amount as price-fixing. The analogy to price-fixing is apt in that unilateral efforts by a seller to increase her price are permitted under antitrust laws. For example, a seller with market power can engage in unilateral monopoly pricing, even though it decreases consumer welfare. However, two sellers cannot get together and agree to charge the profit-maximizing monopoly price, precisely because it will decrease consumer welfare. What one seller may do alone, two may not do together. The economic analysis is similar with tying arrangements. Because two sellers cannot legally agree to charge a higher price in order to maximize their respective profits, they may not attempt to jointly impose a tying arrangement whereby consumers could not purchase the chosen tying product without also purchasing the tied product.

b. *Concerted Action Between a Supplier of a Tying Product and a Supplier of a Tied Product*

A concerted tying arrangement can also be formed between the seller of a tying product and the seller of a tied product. For example, if Seller A sells Product X and Seller B sells Product Y, a concerted tying arrangement exists if Seller A refuses to sell X unless the consumer also purchases Y from Seller B.[47]

At first glance, it may be difficult to see why the supplier of the tying product, Seller A, would agree to such an arrangement.[48] After all, the Chicago School argues that Seller A must decrease the price charged for the tying product in order to force a consumer to purchase the tied product.[49] Nevertheless, the antitrust case law is peppered with instances in which two businesses who sell two separate products (or services) combine to impose a concerted tying arrangement. Such a restraint can be found in at least three instances.

First, the supplier of the tying product and the supplier of the tied product may have an ongoing business relationship, or one seller may own an interest in the other. An extreme version of this exists when the two actors are a parent corporation and its wholly owned subsidiary.[50] Three Supreme Court tying cases illustrate this scenario: *Northern Pacific Railway Co. v. United States*,[51] *Fortner Enterprises, Inc. v. United States Steel Corp.* [*Fortner I*],[52] and *United States Steel Corp. v. Fortner Enterprises, Inc.* [*Fortner II*].[53] In less extreme cases, the

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[47] If the tied product is sold by another party, then there are multiple parties—not including the purchaser—who form an agreement with the intent to restrain trade and thus the tying arrangement properly falls under Section One.

[48] In recognition of this apparent paradox, some case law requires that the seller of the tying product have an economic interest in the tied product before a tie-in is condemned. *See, e.g.*, White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104 (4th Cir. 1987); Carl Sandburg Village Condominium Ass'n v. First Condominium Dev. Co., 758 F.2d 203, 207–08 (7th Cir. 1985). But this rule does not appear universal. In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), the defendant hospital did not have an economic interest in the defendant anaethesiology firm, but the Supreme Court nonetheless characterized the relationship as a tying arrangement.

[49] *See infra* notes 336–37 and accompanying text.

[50] Before the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), a parent and subsidiary were legally capable of forming a combination in violation of the Sherman Act.

[51] 356 U.S. 1, 2–4, n.3 (1958); *see also infra* notes 75–84 and accompanying text.

[52] 394 U.S. 495, 496–97 (1969).

[53] 429 U.S. 610, 613–14 (1977). *Northern Pacific* is particularly important because it is the case in which the Court gave birth to the traditional language defining an illegal tie-in being imposed by a seller on a buyer. The language suggests that the Court was dealing with—and applying—Section One analysis to a unilaterally imposed tying arrangement. But the tying

tying seller merely has a financial interest in the supplier of the tied product.[54]

Second, two suppliers of separate goods may tie their products together as a quid pro quo or because both benefit from the tie-in, each in its own way. For example, in *Jefferson Parish Hospital District No. 2 v. Hyde*,[55] a hospital developed a tying arrangement with a group of anesthesiologists, whereby patients having services performed at the hospital were required to use an anesthesiologist from the approved group. Both parties to the agreement benefited from the tie-in. The anesthesiologists received increased demand for their services, while the hospital received a guaranteed supply of competent doctors who were familiar with the hospital's rules and procedures. The contract between the hospital and the firm of anesthesiologists represented a concerted tying arrangement.[56] Even without a clear quid pro quo, independent businesses may combine to impose a tying arrangement because of their long-standing business relationship.[57]

Third, the dominant seller of the tying product may be imposing a tie-in with the tied product of another seller because the latter provides the dominant seller with a commission, rebate, or other kickback as payment for the tying arrangement.[58] Thus, although the dominant seller has no direct financial interest

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arrangements in *Northern Pacific* were not unilaterally imposed; rather, they were the result of concerted action. *See infra* notes 75–84 and accompanying text. Similarly, in *Fortner I*, the Court described the relationship between the parent and its subsidiary as "a continuing agreement," 394 U.S. at 497, and in *Fortner II*, it quoted the district court's finding that the parent and subsidiary "did combine or conspire to increase sales" through a tie-in. 429 U.S. at 612 n.1 (emphasis omitted).

[54] *See, e.g.*, Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 712 (11th Cir. 1984).

[55] 466 U.S. 2, 7 (1984). Also, the *Fortner I* Court described the tying arrangement as one in which the tying product "is provided by one corporation on condition that a product be purchased from a *separate corporation*[.]" 394 U.S. at 507 (emphasis added).

[56] This statement is descriptive, not normative. To describe the tying arrangement in *Jefferson Parish* as concerted is not to condemn it out of hand. The rationale for the tie-in may constitute a legitimate business justification that renders the restraint reasonable.

[57] *See, e.g.*, Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309, 1310 (3rd Cir. 1975) (examining an alleged concerted tying arrangement between a seller of tying product and a seller of a tied product because of a long-standing business relationship); *see also* Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979) (discussing concerted tying arrangement allegedly imposed to deny plaintiff access to tying product).

[58] *See* Carl Sandburg Village Condominium Ass'n v. First Condominium Dev. Co., 758 F.2d 203, 208 (7th Cir. 1985); Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc., 732 F.2d 1403, 1407–08 (9th Cir. 1984); Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476, 1480–81 (9th Cir. 1983); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 835 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); Osborn v. Sinclair Refining Co., 286 F.2d 832, 832 (4th Cir. 1960).

in the tied product seller as an entity, the tying seller is nonetheless receiving monetary compensation for imposing the tie-in.

In sum, not only is it conceivable for two entities who are not competitors to agree to implement a concerted tying arrangement, such concerted tying arrangements can be found throughout antitrust jurisprudence.[59]

c. *Concerted Action Between a Dominant Seller and Alternative Suppliers of the Tying Product*

A third form of concerted tying arrangement exists when the dominant seller of a tying product cajoles alternative suppliers of the tying product only to sell their product to consumers who accept the dominant seller's tie-in. For example, the tying arrangement in *Eastman Kodak Co. v. Image Technical Services, Inc.*[60] represents such a concerted tie-in. Kodak controlled almost one hundred percent of the market for parts for Kodak copiers. Kodak imposed a tying arrangement whereby consumers could not purchase Kodak parts unless they also purchased Kodak service or, at a minimum, agreed not to purchase service from any independent service organizations (ISOs). Although at first blush the tying arrangement in *Kodak* appears unilateral because Kodak alone tied its parts to Kodak service, Kodak's tying arrangement was in fact concerted: Kodak's parts suppliers agreed with Kodak not to provide parts to ISOs that competed with Kodak to service Kodak copiers. The Supreme Court explained how Kodak worked in concert with other suppliers to effect its tying arrangement:

> As part of the same policy [of selling parts only to equipment owners who refrain from using ISOs for service], Kodak sought to limit ISO access to other sources of Kodak parts. *Kodak and the OEM's* [original equipment manufactures, independent companies that manufactured Kodak parts to Kodak's specifications,] *agreed that the OEM's would not sell parts* that fit Kodak equipment to anyone other than Kodak. Kodak also pressured Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISO's.
>
> Kodak intended, through these policies, to make it more difficult for ISO's to sell service for Kodak machines. It succeeded. ISO's were unable to obtain parts from reliable sources, and many were forced out of business, while others lost substantial revenue. Customers were forced to switch to Kodak service even though they preferred ISO service.[61]

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[59] *See supra* notes 51–58; *see also* Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514, 1515 (2d Cir. 1989).

[60] 504 U.S. 451, 458 (1992).

[61] *Id.* at 458 (citations omitted) (emphasis added); *see also id.* at 485 (referring to "evidence that Kodak forced OEM's, equipment owners, and parts brokers not to sell parts to

The *Kodak* case illustrates why this form of concerted tying arrangement is far worse for consumers than the same tying arrangement without concerted action. If Kodak had simply announced a tying arrangement by which consumers purchasing spare parts from Kodak must also use Kodak service, then consumers not wanting Kodak service could have circumvented the tie-in by purchasing parts from other suppliers and then contracting with ISOs to provide service. By restraining trade in the parts market in concert with other suppliers, Kodak put teeth in its tying arrangement. Consequently, this concerted tying arrangement decreased consumer choice (and consumer welfare to the extent that ISOs charged less for service than Kodak) much more than a unilaterally imposed tying arrangement would have.[62]

3. *The Courts' Failure to Recognize the Distinction Between Unilateral and Concerted Tying Arrangements*

Just as unilateral and concerted business conduct in general receive disparate treatment under antitrust laws, unilateral tying arrangements should be treated differently than concerted tying arrangements.[63] This is because, as with most

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ISO's").

Some litigants have argued that *Kodak* held that unilaterally imposed tying arrangements are violative of Section One. *See* Systemcare, Inc. v. Wang Lab. Corp., 85 F.3d 465, 470 (10th Cir. 1996), *rev'd en banc*, 117 F.3d 1137 (10th Cir. 1997). Such an argument reads too much into the Court's opinion in that the Court did not address the issue head on because Kodak did not ask the Court to determine whether unilaterally imposed tying arrangements are immune from antitrust liability under Section One. The closest that Kodak came to advancing such a position was its characterization of a policy as a unilateral refusal to deal. In response to Kodak's argument, the Supreme Court did not consider the issue of unilaterally imposed tying arrangements, but rather found that Kodak's policy constituted a tying arrangement and not a unilateral refusal to deal. *See Kodak*, 504 U.S. at 462–63. The Court then emphasized the inherent concerted nature of Kodak's policy by noting that even if "Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not." *Id.* at 463 n.8. Thus, the tying arrangement in Kodak was not unilaterally imposed, but required the participation of separate parties. Indeed, the Supreme Court emphasized the central role of Kodak's agreements with third parties in affecting Kodak's tying arrangement.

62 If Kodak parts are defined as a relevant market unto itself, then even if Kodak's tying arrangement were clearly unilateral, it could still be violative of Section Two. Kodak arguably had a monopoly over Kodak parts that it could leverage into a monopoly over the market for service of Kodak equipment.

63 Presumably, while the Chicago School defends tying arrangements as harmless, *see infra* notes 336–37 and accompanying text, even hard-core Chicagoans would concede that concerted tying arrangements pose significant anticompetitive dangers. *See* POSNER, *supra* note 28, at 171 ("[C]ollusion poses the most serious danger to the maintenance of a

trade restraints, concerted tying arrangements present an inherent risk of anticompetitive harm that unilateral tying arrangements do not.[64] If all sellers collude to tie Product X to Product Y, consumers are in a significantly worse situation than if a dominant seller unilaterally implemented such a policy. In the latter scenario, if the consumer does not want Product Y, she can simply purchase Product X from another seller.[65] If there were a concerted tying arrangement, this would not be an option.

The current law on tying arrangements fails to recognize the fundamental distinction between unilateral and concerted tie-ins. Thus, despite the Sherman Act's clear distinction between unilateral and concerted conduct, *all* tying arrangements are presently evaluated under Section One, which governs only concerted action. As a result, all tying arrangements are treated as concerted action without any inquiry into whether the tie-in is unilaterally imposed or the result of collusion among separate business entities.

The Supreme Court has not acknowledged the fact that tying arrangements can be unilateral or concerted. Indeed, the Supreme Court has not explicitly addressed the issue of whether (or why) a unilaterally imposed tying arrangement violates Section One.[66] For the first half century of the Sherman

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competitive economy.").

[64] A concerted tying arrangement whereby the seller of a tying good and the seller of a tied product bundle their products together does not necessarily pose the same anticompetitive threats of the other two forms of concerted tying arrangements: those in which two competitors jointly impose a tie-in or in which a dominant seller coerces other sellers to acquiesce in the tie-in. Whereas these latter two forms of tie-in decrease consumer bargaining power in the tying market, the former does not because there is no increase in anyone's market power over the tying market by acting in concert.

[65] *See* William R. Andersen, Kodak *and Aftermarket Tying Analysis: Some Comparative Thoughts*, *in* ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY 277, 278 (John O. Haley & Hiroshi Iyori, eds.) (1995) ("When the buyer has adequate substitutes for the tying product, the tie may have no force—a meaningless gesture by the seller."). The free market can act to correct unilateral tying arrangements because if consumers do not want the bundled goods, the bundling seller will lose market share and be compelled to modify or eliminate the bundling, in the same way that the existence of other sellers deters a dominant seller from raising her price to supra-competitive levels.

[66] *See* City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 650 n.10 (10th Cir. 1992). The Supreme Court has never articulated a distinction between unilateral and concerted tying arrangements, but neither has it explicitly explained how unilaterally imposed tying arrangements satisfy the concerted action requirement of Section One. Nor is the Supreme Court likely to address the specific issue of unilateral versus concerted tying arrangements. Until recently, however, there was a slight split among the circuits, with the Tenth Circuit holding that unilaterally imposed tying arrangements do not satisfy Section One's concerted action requirement. *See Systemcare*, 85 F.3d at 469–70, *rev'd en banc* 117 F.3d 1137 (10th Cir. 1997); *City of Chanute*, 955 F.2d at 650; McKenzie v. Mercy Hosp., 854 F.2d 365, 367

Act; the Supreme Court did not invalidate a unilaterally imposed tying arrangement under Section One of the Sherman Act.[67] Although the Court had invalidated tying arrangements, most cases clearly involved two businesses collectively agreeing to impose a tying arrangement, thus satisfying (at least impliedly) Section One's requirement of concerted action,[68] or involved unilateral tying arrangements that were held violative of Section Three of the Clayton Act.[69]

Half a century into Sherman Act jurisprudence, *International Salt, Inc. v. United States*[70] represented a turning point.[71] *International Salt* was the first case in which the Supreme Court applied per se analysis to tying arrangements.[72] But

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(10th Cir. 1988). The Tenth Circuit has since resolved an intracircuit split of authority by adopting the majority rule. *See Systemcare*, 117 F.3d at 1142–43 (en banc). Furthermore, the federal circuits will not soon reexamine the jurisprudence of unilateral tying arrangements because of their collective reticence to consider—let alone concede—that a line of cases was incorrectly decided. For example, questioning the (recently overruled) Tenth Circuit line of authority holding unilateral tying arrangements outside of Section One's reach, one commentator asked, "If correct in its reasoning that absent an agreement between the defendant and a third party, there can be no Section 1 violation, then what is the status of this long history of accepted caselaw?" WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 58–59 (1997).

[67] Indeed, many early tying arrangements were upheld by the Court. *See, e.g.*, Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3, 4 (1936); United States v. United Shoe Mach. Co., 247 U.S. 32, 66–67 (1918) [*United Shoe I*]; Henry v. A.B. Dick Co., 224 U.S. 1, 35–36 (1912).

[68] *See* United States Steel Corp. v. Fortner Enters., 429 U.S. 610, 613–14 (1977); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 496–97 (1969); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 n.3 (1958).

[69] *See* Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949); International Bus. Mach. Corp. v. United States, 298 U.S. 131, 134–35 (1936); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 517–18 (1917). In some cases, a unilateral tying arrangement was challenged under Section Three of the Clayton Act, and Section One violations were tacked on without significant analysis. Unfortunately, this line of cases, in which unilaterally imposed tying arrangements were treated under the Clayton Act and concerted tying arrangements were analyzed under the Sherman Act, became conflated and unilaterally imposed tying arrangements began to be analyzed under Section One.

[70] 332 U.S. 392 (1947).

[71] In *International Salt*, the government initiated a civil action to enjoin the International Salt Company from enforcing lease provisions that tied patented machines (the tying product) to International Salt's products. The government brought suit under Section One of the Sherman Act and Section Three of the Clayton Act. *Id.* at 393.

[72] *See id.* at 396. Although tying arrangements continue to be nominally per se illegal, in reality the current test contains many elements of Rule of Reason analysis, in that the plaintiff must show that the defendant possesses market power and defendants are afforded an opportunity to present business justifications for their conduct.

The initial decision to impose per se liability seems suspect. In imposing per se liability, most importantly, for our purposes, *International Salt* appears to be the first case in which the Supreme Court invalidated an apparently unilaterally imposed tying arrangement under Section One of the Sherman Act.[73] Since *International Salt*, subsequent Supreme Court decisions have invalidated tying arrangements that appear to be unilaterally imposed.[74]

But the single most important act that the Court has taken to encourage the position that unilaterally imposed tying arrangements should be analyzed under Section One is how the Court has defined tying arrangements. The classic definition of a tying arrangement comes from *Northern Pacific Railway Co. v. United States*,[75] in which the Court defined a tying arrangement as "an agreement by *a party* to sell one product but only on the condition that the buyer also purchases a different (or tied) product."[76] This definition implies that all tying arrangements are unilaterally imposed because the definition speaks only in terms of one seller imposing a tie-in on one buyer.[77] Subsequent courts have repeated this singular language from *Northern Pacific*.[78] By defining the tying arrangement as being imposed by a single seller while condemning it under Section One, the *Northern Pacific* opinion gave the impression that unilaterally

the Court in *International Salt* relied on *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1947). *Fashion Originators'* was a case brought under Section Five of the FTC Act. *See id.* at 460.

[73] It is not clear whether the tie-in in *International Salt* would have been considered unilateral or concerted action when the case was decided. There were multiple defendants in *International Salt*. However, *International Salt* was the only corporate defendant. *See* United States v. International Salt Co., 6 F.R.D. 302, 304 (S.D.N.Y. 1946). The Supreme Court's opinion is in the singular (i.e., refers to only one defendant) because the plaintiff only brought a summary judgment motion against the one corporate defendant. *See id.* The issue of agreement was never discussed by the lower court or the Supreme Court. The Supreme Court spoke in the singular because there was only one defendant before it and there was no issue regarding the requirement for concerted action. The issue of unilateral tying arrangements was neither briefed by the parties nor addressed by the Supreme Court.

[74] *See, e.g.*, United States v. Loew's, Inc., 371 U.S. 38, 39 (1962).

[75] 356 U.S. 1 (1958).

[76] *Id.* at 5 (emphasis added).

[77] *Northern Pacific* stated the tying arrangement rule in the singular, despite the fact that there was arguably concerted action by multiple defendants. This unfortunate language laid the foundation for what is now taken as a given, namely that unilaterally imposed tying arrangements violate Section One. *See generally id.*

[78] For example, after quoting the *Northern Pacific* singular definition of a tying arrangement, the Court in *Kodak* stated that the "'essential characteristic of an invalid tying arrangement lies in *the seller's* exploitation of *its* control over the tying product to force the buyer into the purchase of a tied product.'" Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 464 n.9 (1992) (quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984)) (emphasis added).

imposed tying arrangements should be evaluated under Section One.

However, the Court's use of the singular language in *Northern Pacific* is misleading because it makes the tying arrangement at issue appear unilaterally imposed. In reality, at the time the case was decided, the tie-in constituted concerted action between two businesses conspiring to restrain trade. The challenged tie-in was the product of an agreement between Northern Pacific Railway and its wholly owned subsidiary, Northwestern Improvement Co.[79] When the Supreme Court decided the case in 1958, a corporation could be liable for conspiring with its own wholly owned subsidiary.[80] Not until the 1984 *Copperweld* decision did the Supreme Court hold that a corporation was legally incapable of conspiring with its wholly owned subsidiary.[81] In short, the agreement between Northern Pacific and Northwestern Improvement constituted concerted action when the case was decided, although it would be considered unilateral conduct today.

The Court used singular language—"a seller" imposes the tie-in on a buyer—as a convenience. After using language suggesting that there was only one defendant, the Court explained in a footnote:

> Actually there are two defendants here, the Northern Pacific Railway Company and its wholly owned subsidiary Northwestern Improvement Company which sells, leases and manages the Railroad's lands. For convenience and since Northwestern is completely controlled by the Railroad we shall speak of the two of them as a single "defendant" or as the "Railroad."[82]

Thus, the tying arrangement in *Northern Pacific* was the product of an agreement between two defendants.[83] By employing language that gave the appearance of one defendant, instead of two, the Court inaccurately suggested that the tying

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[79] *See infra* note 82.

[80] *See generally* Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981). The Supreme Court's own jurisprudence clearly indicated that a parent corporation could legally conspire with its wholly owned subsidiary to violate Section One of the Sherman Act. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

[81] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984).

[82] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 n.3 (1958).

[83] *See* Northern Pac. Ry. Co. v. United States, 142 F. Supp. 679, *aff'd*, 356 U.S. 1 (1958). It is also interesting that while the government brought its case against Northern Pacific under both Sections One and Two of the Sherman Act, its motion for summary judgment was grounded solely on Section One. *See* Jurisdictional Statement of Appellant at 8, Northern Pac. Ry. Co. v. United States, 365 U.S. 1 (1958) (No. 59).

arrangement was unilaterally imposed. But this use of singular language was not meant to define the legal test for tying, but was merely a linguistic convenience.

In essence, the current definition used to condemn unilaterally imposed tying arrangements was built on a foundation (that a corporation can conspire with its wholly owned subsidiary) that has since shifted, yet the original structure built on an outdated foundation remains in place. Whether *Northern Pacific* would have come out the same way if the *Copperweld* doctrine had been in place is indeterminable because no tying defendant has argued that a unilaterally imposed tying arrangement should not fall within Section One of the Sherman Act. The defendants in *Northern Pacific* did not advance this argument because that particular tie-in was clearly concerted action under the then-prevailing law.[84] Forty years later in the post-*Copperweld* era, courts and commentators read *Northern Pacific* as condemning a unilaterally imposed tying arrangement; nobody recognizes that this was, in fact, a concerted tying arrangement. In short, although the Court's language appears to indict unilateral tying arrangements, the restraint in *Northern Pacific* was a concerted tying arrangement. The distinction is lost because, by today's legal standards, the tying arrangement in *Northern Pacific* is seen as unilateral. Given this misreading of *Northern Pacific*, no one has ever argued to the Supreme Court that unilaterally imposed tying arrangements do not belong within Section One of the Sherman Act, despite the fact that the Court has never explicitly held to the contrary.

III. MISCHARACTERIZING UNILATERALLY IMPOSED TYING ARRANGEMENTS AS CONCERTED ACTION

The current assumption that all tying arrangements—whether unilateral or concerted—are to be analyzed under Section One of the Sherman Act is at odds with the rest of Section One jurisprudence. The traditional formulation of a Section One violation includes three elements: (1) a contract, conspiracy, or combination, also referred to as an agreement or concerted action; (2) an unreasonable restraint of trade; and (3) an interstate commerce requirement.[85] Under this traditional formulation, the court must first find an agreement or concerted action before advancing to the second element of whether or not a

[84] If *Copperweld* had governed, Northern Pacific could have argued that it could not conspire with its wholly owned subsidiary and that its unilaterally imposed policies should not be evaluated under Section One.

[85] *See* American Ad Management, Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996). Some courts also include antitrust injury as an element, but this is not done uniformly. This may be explained by the fact that antitrust injury is often considered a standing requirement in antitrust litigation. Thus, many courts consider antitrust injury as a threshold standing issue and not as a substantive element of each individual Section One violation.

challenged restraint of trade is unreasonable.

Tying arrangements are not analyzed under this traditional formulation.[86] Rather, tying arrangements are evaluated under a four- (or sometimes five-) part test of elements unique to tying arrangements. In general, the required elements of a Section One tying violation are: (1) two separate products or services; (2) "conditioning" the sale of one product or service on the purchase of another; (3) sufficient market power over the tying product by the seller to force the buyer to purchase the tying product; and (4) affected volume of interstate commerce in the tied product is "not insubstantial."[87]

This is the entirety of the test for proving an illegal tying arrangement under Section One. It does not parallel the traditional Section One elements.[88] There is

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[86] Tying arrangements could be evaluated under this standardized framework. *See infra* Part VI. After all, a tying arrangement is simply a form of an unreasonable restraint of trade—one way of meeting the second element of a Section One violation. However, courts do not employ the traditional Section One test when condemning tying arrangements.

[87] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461–62 (1992); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 498–99 (1969). An example of a five-part test is found in *DeJesus v. Sears, Roebuck & Co.*, 1995-1 Trade Cas. (CCH) ¶ 70,948, at 74,298 (S.D.N.Y. 1995), which noted that the Second Circuit requires:

> [A]llegations and proof of five elements before finding a tie illegal: (1) a tying and a tied product; (2) evidence of actual coercion by the seller that forced the buyer to accept the tied product; (3) sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; (4) anticompetitive effects in the tied market; and (5) involvement of a 'not insubstantial' amount of interstate commerce in the tied product market.

Id. (citation omitted); *see also* Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 63 F.3d 1540, 1546 (10th Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996); Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1423–24 (9th Cir. 1995).

Some courts also add an element requiring the tying seller to have an economic interest in the tied product market. *See* Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 712 (11th Cir. 1984); Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977); Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309, 1317 (3d Cir. 1975). Other courts have rejected such a requirement. *See, e.g.*, Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514, 1517 (2d Cir. 1989). The Supreme Court has never recognized an economic interest element. *See id.* Given the reasons for condemning tying arrangements, there is a strong argument to reject an economic interest requirement. *See* Penn Galvanizing Co. v. Lukens Steel Co., 59 F.R.D. 74, 84 (E.D. Pa. 1973); Eric D. Young, *The Economic Interest Requirement in the Per Se Analysis of Tying Arrangements: A Worthless Inquiry*, 58 FORDHAM L. REV. 1353, 1364 (1990). Arguably, the economic interest requirement does not make sense given that a concerted tying arrangement raises its own collusion issues. *See supra* notes 39–62 and accompanying text.

[88] However, the tying arrangement test does include the element of interstate commerce

no explicit inquiry into or discussion of an agreement or concerted action requirement, which is the first (and often threshold) inquiry in all other Section One cases. While the element of agreement is arguably implicitly folded into the coercion requirement and the fact that there must be an actual purchase, it is not discussed or analyzed independently. The omission of a specific discussion of concerted action is ironic, given that it is often treated as the sine qua non of Section One violations. In essence, the tying test starts at the second element of the Rule of Reason test and asks simply whether the restraint (the tie-in) is unreasonable. Part III explains why this failure to analyze the agreement requirement explicitly creates significant doctrinal inconsistencies.

A. *Unilateral Tying Arrangements as Unilateral Conduct*

The fact that all tying arrangements are evaluated under Section One of the Sherman Act raises serious questions about whether unilateral conduct is being condemned under Section One in contravention of the basic framework of the Sherman Act. A tying arrangement that is unilaterally imposed—and not the result of concerted implementation—looks like the type of conduct that has traditionally been immune from Section One scrutiny. In *United States v. Colgate*,[89] the Supreme Court held that a manufacturer can unilaterally announce its pricing policy and refuse to do business with those distributors who decline to follow the announced policy.[90] The *Colgate* Court opined that:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[91]

As long as a manufacturer does not become too involved in micro-managing its retailers' policies[92] and does not engage the assistance of third parties in

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by requiring that a not insubstantial amount of commerce in the tied product be affected. Like the interstate commerce requirement in general, this element has few teeth.

89 250 U.S. 300 (1919).

90 *See id.* at 307.

91 *Id.* Similarly, in nonantitrust contexts, courts have generally held that a party to a contract can set the terms of that contract. *See, e.g.*, Ambroze v. Aetna Health Plans of N.Y., Inc., 1996-1 Trade Cas. (CCH) 71,450 (S.D.N.Y. 1996) (upholding HMO's ability to refuse to negotiate with providers of anesthesia services).

92 *See* United States v. Parke, Davis & Co., 362 U.S. 29, 45 (1960).

enforcing its unilaterally announced policy,[93] the manufacturer's announcement of the terms upon which it will deal is, as a matter of law, deemed unilateral conduct outside of the reach of Section One. For over three-quarters of a century, the *Colgate* doctrine has clearly delineated a safe harbor for a nonmonopolist to announce its terms and stick to them.[94] It remains the law of the land.[95]

A unilaterally imposed tying arrangement closely resembles the type of conduct upheld in *Colgate*. After all, what is a tying arrangement if not a unilateral announcement of the terms upon which a seller will deal? For example, a tying arrangement exists when a seller simply announces that she will not sell Product X separately from Product Y, but will only sell them as a bundled package. A clear illustration would be a shrink-wrapped package, which physically ties two products into one commodity for sale. In essence, shrink wrapping two products together and putting them on a store shelf is simply a variation of *Colgate*'s unilateral announcement of the terms upon which the seller will deal. In the same way that a seller's unilateral act of setting a price becomes illegal only when done in concert with a competitor, the unilateral act of bundling products should not create any antitrust issues unless such bundling is done in concert with another entity or threatens monopolization.[96]

Through the *Colgate* Doctrine, the structure of federal antitrust laws creates a safe harbor for unilateral conduct by a nonmonopolist. A nonmonopolist should not have to worry about whether its unilateral conduct violates the Sherman Act. If she takes unilateral action in setting prices and packaging her wares, she should have assurances that she will not be liable for treble damages unless the conduct creates, maintains, or threatens a monopoly. Otherwise, sellers may not attempt innovative methods of packaging.[97] It is the safe harbor for unilateral (nonmonopolizing) action that provides the seller the latitude to

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[93] *See* Albrecht v. Herald Co., 390 U.S. 145, 149-50 (1968), *rev'd on other grounds*, State Oil Co. v. Khan, 522 U.S. 3 (1997). When a manufacturer seeks outside assistance in enforcing its unilaterally imposed policy, courts are apt to find concerted action. In *Albrecht*, the Supreme Court reasoned that a newspaper publisher's unilateral price scheme became concerted action when the publisher hired outside agents to replace offenders. *See id.* at 150.

[94] *Cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

[95] *See, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761–63 (1984).

[96] Alternatively, if Section Three of the Clayton Act is employed, a tying arrangement can be condemned if it substantially lessens competition. *See infra* notes 384–92 and accompanying text.

[97] Sellers are devising more innovative ways to market their wares, structuring sales in different ways and packaging goods in different forms. *See infra* notes 341–48 and accompanying text. Yet, according to many courts, a seller employing a strategy of "buy X, get Y free" is forcing a tying arrangement on its customers. *See* Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 63 F.3d 1540, 1548 (10th Cir. 1995).

engage in aggressive competition.[98] To protect this safe harbor, a tying arrangement in which a seller bundles two goods should not be subject to scrutiny under Section One.

In sum, unilateral packaging and marketing decisions should not be subject to Section One scrutiny. A tying arrangement conceived, announced, and enforced by a single seller is quintessential unilateral business conduct. Treating a single seller's sale of bundled goods as concerted action trivializes the concerted action requirement.

B. *Divining Concerted Action from Unilateral Conduct*

If a unilaterally imposed tying arrangement resembles the type of unilateral announcement of sales terms that is protected under *Colgate*, how then have courts brought unilaterally imposed tying arrangements within the reach of Section One? Section One of the Sherman Act requires proof of concerted action in the form of a "contract, combination . . . or conspiracy in restraint of trade." Although these terms are sometimes used interchangeably by courts,[99] there are clear differences between a contract and a conspiracy.[100] To determine whether a unilaterally imposed tying arrangement constitutes concerted action, it is instructive to examine individually each form of concerted action delineated in the Sherman Act.

1. *Conspiracies and Combinations*

A unilaterally imposed tying arrangement between a seller and a buyer cannot constitute a conspiracy under Section One of the Sherman Act for several related reasons. First, in order to find an antitrust conspiracy there must be two or more wrongdoers.[101] This is consistent with the general purpose of punishing

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[98] *See* Smith Int'l, Inc. v. Kennametal, Inc., 621 F. Supp. 79, 87 (N.D. Ohio 1985) (noting that unilateral action is not illegal).

[99] *See* LEGISLATIVE HISTORY, *supra* note 17, at 31.

[100] *See* Northern Sec. Co. v. United States, 193 U.S. 197, 403 (1904) (Holmes, J., dissenting) ("The words hit two classes of cases, and only two—contracts in restraint of trade and combinations or conspiracies in restraint of trade.").

[101] *See* W. W. THORNTON, A TREATISE ON THE SHERMAN ANTI-TRUST ACT 430 (1913) ("The gist of an offense in a conspiracy is the unlawful agreement. A conspiracy cannot be committed by one person alone. There must be two wills acting together. A single defendant, under a charge of conspiracy, cannot be convicted alone."). Thus, in criminal law, an apparent agreement between a lone defendant and an undercover government agent cannot constitute an agreement for conspiracy purposes. *See* United States v. Manotas-Mejia, 824 F.2d 360, 365 (5th Cir. 1987), *cert. denied*, 484 U.S. 957 (1987); United States v. Giry, 818 F.2d 120, 126 (1st Cir. 1987), *cert. denied*, 484 U.S. 855 (1987); United States v. Fincher, 723 F.2d 862, 863

conspiracies, namely, that concerted activity poses a greater danger to order than does individual wrongdoing.[102] There are not two wrongdoers in a unilaterally imposed tying arrangement because only the seller imposing the tie-in has potentially broken the law.[103]

Second, in order to establish an antitrust conspiracy there must exist a mutual intent to achieve the objectives of the conspiracy.[104] Conspiracy law requires that at least two parties agree to pursue an unlawful course of action.[105] It is well-established that each conspirator must be a knowing participant who seeks to advance the objectives of the conspiracy.[106] The objective of a Section One conspiracy is to limit competition.[107] While a single seller imposing a tying arrangement may intend to restrain trade, the unwilling buyer shares no such intent. Thus, in the case of a unilaterally imposed tying arrangement, there is no mutual intent to achieve a common objective and thus no conspiracy.[108]

(11th Cir. 1984).

[102] *See* United States v. Feola, 420 U.S. 671, 693 (1975); Krulewitch v. United States, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring) ("[T]o unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer.").

[103] *See infra* notes 195–202 and accompanying text (discussing how a unilaterally imposed tying arrangement represents the only Section One violation in which there is but one defendant).

[104] *See* Smith v. Northern Mich. Hosps., Inc., 703 F.2d 942, 949 (6th Cir. 1983) ("To establish a violation of section 1 . . . plaintiff must establish that the defendants combined or conspired with an intent to unreasonably restrain trade.").

[105] *See* United States v. Barboa, 777 F.2d 1420, 1422 (10th Cir. 1985); United States v. Hayes, 775 F.2d 1279, 1283 (4th Cir. 1985); United States v. Rodriguez, 765 F.2d 1546, 1552 (11th Cir. 1985); United States v. Goldberg, 756 F.2d 949, 958 (2d Cir. 1985), *cert. denied*, 472 U.S. 1009 (1985); United States v. Escobar de Bright, 742 F.2d 1196, 1199 (9th Cir. 1984); United States v. Chase, 372 F.2d 453, 459 (4th Cir. 1967), *cert. denied*, 387 U.S. 907 (1967).

[106] *See* United States v. Haldeman, 559 F.2d 31, 112 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

Similarly, the *Sample Jury Instructions in Civil Antitrust Cases* of the Antitrust Section of the American Bar Association define the participation and intent requirements for conspiracy as follows: "Before you can find that a defendant was a member of the conspiracy alleged by plaintiff, the evidence must show that that defendant knowingly joined in the unlawful plan at its inception or at some later time with the intent to advance or further some object or purpose of the conspiracy." SECTION OF ANTITRUST LAW, ABA, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES at B-11 (1999). The *Sample Instructions* specifically note that "a person who has no knowledge of a conspiracy, but happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator." *Id.*

[107] *See infra* notes 133–48 and accompanying text.

[108] Furthermore, as a matter of both logic and law, a wrongdoer cannot conspire with her

Another way of demonstrating concerted action under Section One is by proving the existence of a "combination."[109] The buyer and seller in a unilaterally imposed tying arrangement do not constitute a combination for Section One purposes for at least two reasons. First, combination as used in the Sherman Act refers to business combinations, such as trusts.[110] The precise wording of the Sherman Act proscribes every "combination in the form of trust or otherwise."[111] Congress did not limit the Act to trusts alone because business combinations such as pools and holding companies were also common and had similar anticompetitive effects.[112] In short, combination means business combinations, not every individual transaction in which a consumer purchases goods from a single seller.

Second, as in the case of conspiracies, combinations generally require a mutual intent to achieve a common purpose. *Black's Law Dictionary* defines combination as "[t]he union or association of two or more persons for the attainment of some common end."[113] Thus, because the seller imposing and the buyer accepting a tying arrangement do not share a common purpose,[114] these parties do not represent a combination.

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victim. If the mere acquiescence of a crime victim could constitute a conspiracy, then whenever a robbery victim handed over his property, he would be guilty of participating in a conspiracy to commit robbery. Similarly, a person who pays ransom would be a participant in a kidnapping conspiracy.

[109] Courts in the modern era rarely discuss combinations as such, instead relying on the statutory language of "conspiracy" and "contract," or the accepted shorthand of "agreement" and "concerted action."

[110] *See, e.g.*, 21 CONG. REC. S3147–48 (daily ed. Apr. 8, 1890) (statement of Sen. George) *reprinted in* LEGISLATIVE HISTORY, *supra* note 17.

[111] 15 U.S.C. § 1 (1994).

[112] 21 CONG. REC. H4092 (daily ed. May 1, 1890), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17.

> In general terms, we all know that a trust is the latest and most perfect form of combination among competing producers to control the supply of their product, in order that they may dictate the terms on which they shall sell in the market and may secure release from stress of competition among themselves. From the very beginning of trade perhaps, certainly in all its known history, there have been various forms of combination, and we have long been familiar with them in this country under the name of pools, corners, combines, and the like.

Id.

[113] BLACK'S LAW DICTIONARY 266 (6th ed. 1990) (citing Albrecht v. Herald Co., 367 F.2d 517, 523 (8th Cir. 1966)).

[114] Indeed, most courts hold that the buyer must be coerced. *See infra* notes 203–210 and accompanying text.

Ruling out conspiracy and combination leaves only contracts as the possible form of concerted action. And this—either explicitly or impliedly—is what courts have relied on to hold that unilaterally imposed tying arrangements fall within Section One.

2. *Contracts with Tying Clauses as Concerted Action Between a Buyer and a Seller*

Because it would be difficult to establish concerted action under either the conspiracy or combination prong of Section One, plaintiffs and courts are more likely to rely on the Sherman Act's prohibition of contracts in restraint of trade.[115] Under the theory that a tying arrangement constitutes a contract between the seller who ties two products and the buyer who accepts the tie-in, courts have held that unilaterally imposed tying arrangements meet the statutory requirement of "a contract, combination or conspiracy."[116] While a sale between a buyer and a seller on agreed-upon terms is literally a contract, that does not necessarily mean that it is a contract for Section One purposes. This is true for several reasons. First, the Sherman Act's text has not been read so literally. Second, the parties to the contract do not share an intent to restrain trade. Third, forced acquiescence does not generally constitute an agreement for antitrust purposes. Fourth, Congress did not intend Section One of the Sherman Act to reach contracts between a seller and a buyer.

a. *The Trouble with Literalism*

The literalist argument is simple: Section One proscribes contracts in restraint of trade and a tying arrangement is a contract that restrains trade; thus, tying arrangements violate Section One. But the literalists have a difficult row to hoe. The mere presence of a contract does not convert unilaterally imposed policies into concerted action. If it did, Section One would swallow Section Two and the protective wall between unilateral and concerted action would crumble.[117]

First, the Supreme Court has eschewed literalness in Section One cases. The

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[115] *See* 9 AREEDA, *supra* note 30, at 12 ("The 'contract, combination, or conspiracy' that triggers § 1 is obviously present when the buyer promises to take his requirements of the second product from a supplier as an express quid pro quo for being allowed to buy the tying product."). However, the vast majority of courts have assiduously avoided the question of why and how unilaterally imposed tying arrangements constitute concerted action.

[116] *E.g.*, Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137, 1145 (10th Cir. 1997) (en banc).

[117] *See infra* notes 281–312 and accompanying text.

entire body of Section One jurisprudence is built on the foundation that Section One is not read literally. By its clear text, the Sherman Act forbids "[e]very contract . . . in restraint of trade."[118] However, the Supreme Court recognized early in *Standard Oil Co. v. United States*[119] that because all contracts necessarily restrain trade on some level, Section One is limited to those contracts that "unreasonably" restrain trade.[120] Decades later, reiterating the principle of *Standard Oil*, the Court opined that if the Sherman Act were read and applied literally, it would "outlaw the entire body of private contract law."[121] Thus, despite the statute's clear language, Section One does not apply to "every contract," but only to "unreasonable contracts." More recently, the Supreme Court recognized in *Broadcast Music, Inc. v. CBS*[122] that in antitrust jurisprudence "[l]iteralness is overly simplistic and often overbroad."[123] Perhaps more to the point, the Court in *Copperweld Corp. v. Independence Tube Corp.*[124] held that even a literal agreement is not necessarily an agreement for Section One purposes.[125] In sum, merely pointing at the existence of a contract does not

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[118] 15 U.S.C. § 1 (1994).

[119] 221 U.S. 1 (1911).

[120] *Id.* at 66–67.

[121] National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978); *see also* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 98 (1984) ("[E]very contract is a restraint of trade[.]"); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").

[122] 441 U.S. 1 (1979).

[123] *Id.* at 9 ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act.") (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)). *Cf.* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 466–67 (1992). ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

[124] 467 U.S. 752 (1984).

[125] *See id.*

> The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the *same* company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police.

Id.; *see also* HOVENKAMP, *supra* note 34, at 230. "In *Chicago Board of Trade* and *Broadcast Music* the Court was willing to consider arguments that agreements among competitors, conceded to 'fix' prices, were not 'price fixing' and did not warrant per se treatment." *Id.*

automatically end the inquiry into whether Section One's concerted action requirement has been satisfied.[126]

Second, there is good reason that the Court has avoided the literal approach in its antitrust jurisprudence: the literal argument proves too much. Not only would every contract be illegal, but read literally the Sherman Act would subject consumers who accede to a tying arrangement to antitrust liability and treble damages. Section one of the Sherman Act explicitly provides that "*[e]very person* who shall make any contract" declared illegal shall be deemed guilty of a felony and punished accordingly.[127] As half of the illegal contract, the buyer has engaged in illegal conduct. The obvious response to this literal reading of the text is that the Sherman Act was not intended to punish consumers who have been victimized or even consumers who willingly purchased bundled goods. The literal reading is necessarily wrong because "every person" does not actually mean "every person." One has to look beyond the words to the intent, purpose, and structure of the Sherman Act to bestow the words with their contextual meaning.[128] The same process of contextual interpretation needs to occur when determining which contracts fall within the Sherman Act's reach.

Third, well-established principles of statutory interpretation require that words be analyzed in context, rather than in isolation.[129] Section One of the Sherman Act does not proscribe every contract; rather it proscribes only those "contract[s] . . . in restraint of trade." There is arguably a difference between a contract that has the effect of restraining trade and a contract in restraint of

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[126] Similarly, the fact that tying arrangements are often called "tying agreements," *see, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958), does not mean that tying arrangements inherently meet the concerted action requirement of Section One. Such an argument begs the question; simply because courts sometimes refer to the restraint as a tying agreement does not mean it should be considered an agreement for Section One purposes. Calling tying arrangements "tying agreements" is a moniker, not analysis. Similarly, tying arrangements are sometimes defined in terms of the buyer "agreeing" to buy a tied product. *See* BLACK'S LAW DICTIONARY 1519 (6th ed. 1990) ("[A] condition imposed by a seller or lessor that a buyer or lessee may obtain a desired product (the "tying" product) only if it also agrees to take an additional product (the "tied" product), which may or may not be desired."). This concept of "agreement" ignores the fact that a tying arrangement (to be illegal under Section One) must not be desired and indeed, must be forced upon an unwilling buyer. *See infra* notes 203–10 and accompanying text.

On the same note, the Court has suggested that "restraint of trade" does not merely refer to the existence of an agreement, but rather to the economic consequences of the agreement. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (1988).

[127] 15 U.S.C. § 1 (1994) (emphasis added).

[128] After all, if one is going to read words literally, one can hardly enjoy the luxury of picking and choosing which words to so read.

[129] *See* Standard Oil Co. v. United States, 221 U.S. 1, 64–65 (1911).

trade.[130] After all, to the extent that every contract restrains trade, "a contract in restraint of trade" must mean more than simply "a contract."[131]

In short, although any given sale represents a contract—regardless of whether or not it includes a tying component—not every sale constitutes a contract that falls within the parameters of Section One for antitrust scrutiny. To read Section One otherwise would mean that federal courts had jurisdiction to review—and approve, reject, or modify—the over one million sales that take place every day in the American economy.[132]

b. *The Absence of Mutual Intent to Restrain Trade*

The intent element often applied to Section One claims supports the position that unilaterally imposed tying arrangements do not resemble concerted action.[133] Antitrust laws are only concerned with those contracts that unreasonably restrain trade. To determine whether a restraint is unreasonable, courts employing the Rule of Reason often examine the intent or purpose of the contract or restraint at issue.[134] This element of intent as used in Section One

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[130] This argument is more fully developed in the following section discussing intent. *See infra* notes 133–48 and accompanying text.

[131] It is a well-established principle of statutory interpretation that each word in a statute carries meaning. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 295 (1994) (stating the "settled rule that a statute must, if possible, be construed in such fashion that every word has operative effect") (citations omitted); Rake v. Wade, 508 U.S. 464, 471 (1993) ("To avoid 'deny[ing] effect to a part of a statute,' we accord 'significance and effect . . . to every word.'") (citations omitted).

[132] *See infra* note 368 and accompanying text.

[133] Intent is often not articulated as a separate, independent element. Rather, most courts state the intent element in civil cases as an alternative element to anticompetitive effects, such that a plaintiff must show either an anticompetitive intent or effect. *See, e.g.*, Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 329–30 (1991). The supposition appears to be that intent can be inferred from anticompetitive effects. But this inferred intent is still a mutual intent, which makes sense only if there are two wrongdoers. *See infra* notes 195–201 and accompanying text.

[134] *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"); Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1445, 1448–49 (9th Cir. 1988) (anticompetitive intent is essential); Smith v. Northern Mich. Hosps., 703 F.2d 942, 949 (6th Cir. 1983) ("To establish a violation of section 1 . . . plaintiff must establish that defendants combined or conspired with an intent to unreasonably restrain trade."); Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th Cir. 1979) (stating that illegality under the Rule of Reason requires "[a]n agreement among two or more persons or distinct business entities . . . [w]hich is intended to harm or unreasonably restrain competition"). However, if there is a significant anticompetitive effect, a lawful intent will not save a restraint from liability. *See* Appalachian Coals, Inc. v. United

case law must be different than the mere intent to form a contract, because hornbook law holds that there is no contract without intent.[135] In other words, if intent is a separate element from the existence of a contract, that intent must be the intent to do more than simply enter a contract because the latter is subsumed by establishing the existence of a contract.[136] Furthermore, while every contract restrains trade, not every contract is entered into with the intent of restraining trade.

The intent inquiry of Section One is properly characterized as a mutual intent to restrain trade. The Supreme Court has stated that an antitrust plaintiff must establish that more than one defendant shared a common intent to achieve an illegal goal.[137] Thus, under the Rule of Reason, an antitrust plaintiff must prove that "the persons or entities to the agreement intend to harm or restrain competition."[138] It is not enough that more than one party agreed to a scheme; rather, both parties must share an intent to restrain trade.[139] For example, in

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States, 288 U.S. 344, 372 (1933).

Anticompetitive intent is, however, required in criminal antitrust cases. *See* United States v. United States Gypsum Co., 438 U.S. 422, 436–37 (1978). However, it is unlikely that criminal charges would be brought against a tying arrangement.

Some may argue that to the extent that tying arrangements can be per se illegal, intent is not an element. But "an agreement" is a requirement under both Rule of Reason and per se analysis. The intent discussion above merely drives home the point that this agreement must be an agreement to reduce competition. Per se analysis does not require an intent discussion because agreements between competitors on certain issues—price, market division, and certain boycotts—necessarily reflect a meeting of the minds between the parties to reduce competition.

[135] JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS §§ 2-1 to 2-2 (2d ed. 1977). Similarly, there is no conspiracy or combination without intent. *See supra* notes 104–14 and accompanying text.

[136] In terms of general contract formation, the common purpose could simply be to enter the contract or to exchange the recited consideration. There is no general requirement that both parties enter a contract for the same purpose. For example, a seller wants money and a buyer wants a product or service. They have different objectives for entering the contract, yet they both mutually assent to the contract. However, the intent requirement for "a contract in restraint of trade" goes further in order to find antitrust liability.

[137] *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

[138] American Ad Management, Inc. v. GTE Corp., 92 F.3d 781, 789 (9th Cir. 1996); *see generally* Seagood Trading Corp. v. Jerrico, 924 F.2d 1555 (11th Cir. 1991); Dunkley v. Peoples Bank & Trust Co., 728 F. Supp. 560 (W.D. Ark. 1989); Bhan v. NME Hosps., Inc., 669 F. Supp. 998, 1020–21 (E.D. Cal. 1987), *aff'd*, 929 F.2d 1404 (9th Cir. 1991). *But see* Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 819 (11th Cir. 1990), *cert. denied*, 495 U.S. 924 (1990).

[139] By analogy, in order for one defendant to be guilty of a Section Two conspiracy to monopolize, at least two defendants must be found to have a specific intent to monopolize. *See* Belfiore v. New York Times Co., 826 F.2d 177, 183 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988); International Distrib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 796 (2d

United States v. Parke, Davis & Co.,[140] individual dealers acquiesced in a supplier's pricing program. However, the Supreme Court reasoned that because each individual dealer acquiesced not to restrain trade but solely to remain a dealer, there was no concerted action for Section One purposes.[141]

This mutual intent element is sometimes expressed as a requirement that both parties to the contract stand to benefit from the restraint in trade.[142] For example, in *Borg-Warner Protective Services Corp. v. Guardsmark, Inc.*,[143] a security firm allegedly forced its employees to sign covenants not to compete.[144] The court reasoned that there could be no plurality of actors because the employees were required to sign the agreements to maintain their employment and, thus, the "employees did not have any independent personal stake and did not stand to benefit from conspiring to restrain trade."[145] The court specifically held that it did not matter that the applicants were not employees when they signed the covenants because they were "not acting as independent economic forces with any reason to restrain trade."[146] In short, if a party to a bilateral contract does not intend to restrain trade and receives no benefit from the restraint, the contract is not a "contract in restraint of trade."[147]

The buyer in a tying relationship has no intent to harm competition; she does not desire to lessen competition. In fact, she has the opposite intent, or so tying

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Cir. 1987), *cert. denied*, 482 U.S. 915 (1987).

[140] 362 U.S. 29 (1960).

[141] *See id.* at 45; *cf.* Addyston Pipe & Steel Co. v. United States, 85 F. 271, 282–83 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 244–45 (1899) (holding that the Sherman Act does not prohibit activity whose competitive harm is "ancillary" to its main purpose). This is not to suggest that acquiescence never constitutes agreement. Conflicting authority exists on this point; however, there are cases supporting the position that parties must share a mutual intent to restrain trade.

[142] The importance of a shared desire to restrain trade has been decisive in cases challenging covenants not to compete as violative of Section One of the Sherman Act. For example, in *Caremark Homecare, Inc. v. New England Critical Care, Inc.*, 700 F. Supp. 1033 (D. Minn. 1988), employees were sued by a health care service provider for a breach of covenant not to compete. The employees counterclaimed that their former employer had violated Sections One and Two of the Sherman Act by forcing them to sign the covenants. The court dismissed the Section One claim for lack of agreement because the employees did not have an independent personal stake in restraining trade. *See id.* at 1035; *see also* Marshall v. Miles Labs., Inc., 647 F. Supp. 1326, 1332 (N.D. Ind. 1986).

[143] 946 F. Supp. 495 (E.D. Ky. 1996).

[144] *See id.* at 498.

[145] *Id.* at 499.

[146] *Id.* at 500.

[147] The one nontying exception to this principle may be vertical restraints, such as resale price maintenance, imposed by a manufacturer on its distributors. *See infra* notes 166–71 and accompanying text.

theory informs us. She would rather be free to purchase the tied product from someone else (on the same or different terms) or forego purchasing the tied product altogether. Because the buyer in a traditional tying relationship does not intend to reduce competition and does not benefit from the restraint, there is no shared intent to reduce competition.[148]

In sum, a reasonable argument can be made that in order for a contract to violate Section One of the Sherman Act, the parties—*both* parties—must intend by their agreement to reduce competition. If only one person desires to reduce competition, there is not an agreement to reduce competition. There may be an agreement that reduces competition, but that alone does not satisfy the intent requirement of a Section One violation. Courts that have found that a single sales contract embodying a tie-in satisfies Section One's "combination, contract, or conspiracy" requirement have not addressed the mutual intent issue that courts in non-tying contexts have often found dispositive.

c. *Contracts and Coercion*

i. *Acquiescence as Concerted Action*

To the extent that a unilaterally imposed tying arrangement constitutes a contract, it does so because the buyer has acquiesced to terms that she would not agree to but for the seller's coercion through its exercise of market power. Indeed, there is a coercion requirement: the plaintiff must show that her agreement to accept a tie-in was coerced.[149]

This raises the issue of whether acquiescence (or "coerced agreement") constitutes an agreement for antitrust purposes. The answer is "probably not." First, the coercion requirement presents a paradox to the extent that legal contracts are generally the products of voluntary agreements.[150] It is a matter of

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[148] *Cf.* Will v. Comprehensive Accounting Corp., 776 F.2d 665, 670 (7th Cir. 1985) ("Certainly the plaintiff in a tying case need not show that it wanted the anticompetitive scheme to succeed; the buyer in a tying case is a victim, and few victims want to pay monopoly overcharges.").

[149] *See infra* notes 203–10 and accompanying text.

[150] For example, the Seventh Circuit has observed that "[a]s a linguistic matter, proof that the buyer took both products in a package against his will negates the existence of a 'contract, combination, or conspiracy.'" *Will*, 776 F.2d at 669 (nonetheless concluding that coerced tying arrangements violate Section One).

Arguing that someone forced you to make a contract in a situation where the existence of a contract is a necessary part of the illegality smacks of arguing "he forced me to make a voluntary agreement." The argument appears internally inconsistent and should negate the finding of a legal contract.

This reasoning only negates a finding of a contract, not a conspiracy. Duress is not a hornbook law that a contract derived from force is not a legally binding contract and a coerced contract is voidable at the duressed party's option.[151] In other words, a unilaterally imposed tying arrangement is only a legal contract if the buyer says it is.[152]

Second, in *Monsanto v. Spray-Rite Service*,[153] the Supreme Court specifically held that unwilling compliance with a unilaterally announced policy does not constitute concerted action.[154] Rather, in Section One cases, a plaintiff must prove that there exists "a conscious commitment to a common scheme designed to achieve an unlawful objective" among multiple parties.[155] Subsequent courts have invoked *Monsanto* to hold that unwilling compliance does not constitute concerted action for Section One purposes.[156] Similarly, in *Fisher v. City of Berkeley*,[157] the Court held that a landowner's unwilling

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defense to a charge of conspiracy, but is a defense in a contract dispute.

[151] *See* CALAMARI & PERILLO, *supra* note 135 § 9-2.

[152] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979). In theory, a buyer wanting only the tying product could acquiesce to the seller's coercion by accepting the tying arrangement, receiving the tying product, and then rejecting or returning the tied product. This, of course, is only a theory because the entire contract would be voided and it is debatable whether the buyer has any claim to the tying product.

[153] 465 U.S. 752 (1984).

[154] *See id.* at 761. Prior to *Monsanto*, several lower courts had held the same. *See, e.g.*, Polytechnic Data Corp. v. Xerox Corp., 362 F. Supp. 1, 8 (N.D. Ill. 1973) ("The alleged mere acquiescence by certain individual Xerox lessees in the unilateral policy of Xerox does not give rise to an illegal combination.").

[155] *Monsanto*, 465 U.S. at 768 (requiring plaintiff present "evidence that tends to exclude the possibility of independent action"); *see also* Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 964 (10th Cir. 1990); *accord* Contractor Util. v. Certain-Teed Prods. Corp., 638 F.2d 1061, 1075 (7th Cir. 1981) (no unlawful concerted action may occur without proof that distributor "encouraged or participated in this decision [by manufacturer to market through distributor] for anticompetitive reasons.").

[156] *See, e.g.*, International Logistics Group Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) ([T]here is no conspiracy between a manufacturer and dealer when the latter involuntarily complies with a manufacturer's unilaterally formulated policy in order to avoid termination[.]); Famous Brands, Inc. v. David Sherman Corp., 814 F.2d 517, 523 (8th Cir. 1987); Acton v. Merle Norman Cosmetics, Inc., 1995-1 Trade Cas. (CCH) ¶ 71,025, at 74,818 (C.D. Cal. 1995) (rejecting claim that pressuring distributors to stop selling competitors' products was an exclusive dealing arrangement because no agreement is formed when a dealer "unwillingly complies [with a demand] solely because he wished to avoid termination"); *see also* Cohen v. Primerica Corp., 709 F. Supp. 63, 65 (E.D.N.Y. 1989) ("[U]nilateral action by one single entity does not constitute concerted activity, and therefore does not violate section 1 of the Sherman Act[.]") (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).).

[157] 475 U.S. 260 (1986).

compliance with a city's rent control ordinance did not constitute concerted action.[158] Lest there be any doubt about the Court's *Monsanto* holding, Professor Areeda noted that in *Monsanto,* "the Court was very explicit that unwilling compliance by dealers to avoid termination does not create an agreement and that compliance with a suggestion or announced condition does not amount to an implied agreement."[159]

By definition, a Section One tying arrangement requires coercion, yet *Monsanto* clearly holds that coerced compliance does not constitute concerted action for Section One purposes. So, why then do unilaterally imposed tying arrangements continue to be evaluated under Section One of the Sherman Act? Courts and commentators have refused to apply the "very explicit" holding from *Monsanto* to tying cases.[160] The reason for such mutiny is a concerted refusal by courts to abandon that line of tying cases that creates a glaring inconsistency in the body of antitrust case law.[161] For example, the Ninth Circuit has declined to follow *Monsanto* because if unilaterally imposed tying arrangements "were to be labeled 'independent,' virtually all tying arrangements would be beyond the reach of [Section One]."[162] Thus, "a number of lower courts have implicitly

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[158] *See id.* at 266–67. The Court's subsequent holdings in *Monsanto* and *Fisher* effectively negate the Court's previous dicta in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), which suggested that unwilling acquiescence can constitute concerted action. *See id.* at 142. ("[E]ach petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements . . . ."). *Perma Life* was already overruled on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 765–66 (1984).

[159] 7 AREEDA, *supra* note 30, at 83.

[160] *See, e.g.,* Will v. Comprehensive Accounting Corp., 776 F.2d 665, 670 (7th Cir. 1985); Black Gold, Ltd. v. Rockwool Indus., 732 F.2d 779, 780 (10th Cir. 1984), *cert. denied,* 469 U.S. 854 (1984).

[161] Some commentators have acknowledged that *Monsanto,* at a minimum, creates problems for tying law. *See* Jean Wegman Burns, *The New Role of Coercion in Antitrust,* 60 FORDHAM L. REV. 379, 427 n.214 ("The only way to avoid the 'coerced agreement' paradox in tying cases is to consider tying as a unilateral action of a monopolist subject to antitrust attack under section 2 of the Sherman Act, if at all."). Professor Burns concludes that "this is an unlikely development," based on Richard Posner's interpretation of the legislative history of the Clayton Act. *Id.* (citing RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 182–83 (1976)). But Judge Posner's argument is merely that the Clayton Act cannot be ignored by the courts, not that tying arrangements cannot be evaluated under Section Two. Indeed, Judge Posner notes that tie-ins can be prohibited under Section Two. Furthermore, the current state of the law on tying ignores (and is inconsistent with) the Clayton Act's limitations on tying. *See infra* notes 384–407 and accompanying text.

[162] Image Technical Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 619 (9th Cir. 1990), *aff'd,* 504 U.S. 451 (1992). The court asserted that it did "not believe that Monsanto, without discussing the courts' tying decisions, meant to overturn them." *Id.*

recognized that *Monsanto* is wrong and have taken the position that *Monsanto*'s requirement of a 'common plan' or agreement cannot possibly apply to tying cases."[163] Such a mistake in thinking flows from the courts' failure to appreciate the distinction between unilateral and concerted tying arrangements. Contrary to the Ninth Circuit's assertion that *Monsanto* removes "all tying arrangements" from Section One, only unilaterally imposed tying arrangements are beyond the reach of Section One. Concerted tying arrangements are still analyzed under Section One;[164] furthermore, unilaterally imposed tying arrangements can be prohibited under Section Two of the Sherman Act and Section Three of the Clayton Act.[165]

ii. *Distinguishing Vertical Distribution Relationships*

The one non-tying area in which courts have occasionally held that forced compliance might constitute combined action is vertical relationships between manufacturer and distributor. For example, a retailer can sue a manufacturer for imposing retail price maintenance.[166] It is difficult to reconcile the implicit holdings in these cases with the explicit holding of *Monsanto*.[167] Regardless, cases involving coercion in vertical distributorships can be easily distinguished from the buyer-seller relationship in a unilaterally imposed tying arrangement.

First, in a coerced distributor situation, the ultimate consumer is not a party to the anticompetitive agreement between a manufacturer and its distributors. When a manufacturer and distributor agree on resale price, they are not merely agreeing on the price that the distributor pays the manufacturer, but rather the

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[163] Burns, *supra* note 161, at 427 n.214 (citations omitted). As a general matter of federal jurisprudence, it is difficult to fathom how lower federal courts can decide that a binding Supreme Court precedent "is wrong" and refuse to apply it. At least one court has tried to resurrect the rule of *Perma Life*, which suggested that a coerced franchisee could sue under Section One, to hold that *Monsanto* does not apply to tying cases. But *Perma Life* was not a tying case between seller and consumer; rather, it was a vertical distribution scenario in which the downstream player claimed its participation with the franchisor's scheme was coerced. How the dicta of *Perma Life*, which was already partially overruled by *Copperweld*, could somehow survive the explicit holding of *Monsanto* is not explained. Why this dicta of questionable case should trump the explicit holding of a more recent Supreme Court case is even harder to understand.

[164] *See infra* Part VI.A.

[165] *See infra* Parts VI.B & VI.C.

[166] *See* State Oil v. Khan, 522 U.S. 3 (1997); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990). The dicta in *Atlantic Richfield* appears inconsistent with the holding of *Monsanto*.

[167] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); *see also supra* notes 153–59 and accompanying text.

price that will be charged to a third party to their negotiation. This is manifestly different from a tying arrangement in which the buyer and seller agree what price they will pay and receive, respectively. The parties to a tying arrangement are not determining the price paid by any person who is not a party to the agreement.[168] Thus, a tie-in does not raise the same competitive dangers as those raised by two parties agreeing how to treat a third person uninvolved in the negotiations.

Second, the hypothetical "coerced distributor" who acquiesces in a vertical distribution agreement case often benefits from the concerted action. When a manufacturer orchestrates a price-fixing scheme for its product, all distributors collectively benefit from the concerted action, even if they lose isolated sales by refusing to cut the price on an individual transaction.[169] This distinction is important because merely alleging acquiescence is insufficient to show a combination for Section One purposes. Rather, as the Fifth Circuit has explained, any "finding of an illegal combination has traditionally been based upon the fact that the third parties benefited from their acquiescence."[170] Whereas the distributor in a manufacturer's price-fixing conspiracy could benefit from its acquiescence, opponents of tying arrangements claim that the buyer does not benefit from acquiescence.[171]

Third, and most important, a contract between a buyer and seller to structure a transaction for bundled goods is not inherently illegal. For example, if a buyer asks for a discount when she purchases two separate goods and the seller (believing the customer is always right) accedes to her wishes, that contract does not violate antitrust laws. The ultimate contract looks the same as a tying arrangement, but it has no antitrust consequences. Absent coercion, a tying arrangement is perfectly legal. In contrast, an agreement between a manufacturer

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[168] Of course, other people may be affected by the tying arrangement between a buyer and seller, most notably the competing seller who might have sold the tied product to the consumer if the consumer were not bound by the tying arrangement. *See* Tic-X-Press v. Omni Promotions Co., 815 F.2d 1407, 1415 & n.15 (11th Cir. 1987). But non-parties to a contract are always affected in this manner by all business transactions. Every sale a business makes is a sale denied to its competitor.

[169] This is basically an illustration of a solution to the tragedy of the commons. *See* Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 CAL. L. REV. 243, 268 n.170 (1993).

[170] Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 289 (5th Cir. 1978); *see also supra* notes 142–47 and accompanying text.

[171] In theory, the consumer benefits from acquiescence in that she can purchase the tying product. But this is a different type of benefit than that received by the acquiescing distributor. The latter benefits directly from that which makes the scheme illegal, namely the nonmarket control over prices. In contrast, the consumer does not benefit from the tie-in itself. The consumer only benefits from the legal part of the contract (the sale of the tying product), not the illegal aspect (the conditioning of the sale as a tie-in).

and distributor to set retail prices violates antitrust laws even if the agreement were not the product of coercion.

This distinction provides an independent insight into why unilaterally imposed tying arrangements should not be proscribed under Section One. In the absence of coercion, a buyer and a seller could freely agree that in return for a certain price on a tying product, the buyer would purchase a tied product. Such a contract would not violate the Sherman Act. Buyers and sellers are supposed to negotiate over the terms of a sale, including the price and package. A manufacturer and a retailer are not allowed to agree on resale prices, regardless of whether or not the retailer's acquiescence is coerced.

iii. *Legislative Intent*

Examining the legislative intent behind the Sherman Act casts doubt upon the wisdom of analyzing unilaterally imposed tying arrangements under Section One. There are several indications that Congress did not intend Section One to condemn unilaterally imposed tying arrangements. First, contracts between a buyer and a seller are not the type of concerted action that Congress intended the Sherman Act to address.[172] A buyer and seller are allowed to make a contract that restrains trade; competitors are not. This distinction is critical.[173] The purpose of Section One is to prohibit collusion among independent business people, not contracts between a seller and the ultimate consumer.

Congress wanted to stop anticompetitive business combinations. For example, the Supreme Court has noted that "[t]he sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.'"[174] In particular, Congress was concerned about concerted action among competitors. Early in its antitrust jurisprudence, the Supreme Court recognized that "[t]he Sherman Act was specifically intended to prohibit

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[172] Contracts between buyer and seller are not inherently suspicious; indeed, they are precisely the act that free markets are intended to foment. Relations between a buyer and a seller are not the type of concerted activity that the Sherman Act was intended to reach; such concerted activity is the sine qua non of any trade, the very essence of competition. It is not "fraught with anticompetitive risk." Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 761 (1984).

[173] *See* THORNTON, *supra* note 101, at 364 ("Thus contracts or combinations that merely diminish or prevent competition among those who are parties to them, without restraining the trade or commerce of others and without constituting a monopoly, or an attempt to monopolize, are not unlawful at common law[.]").

[174] Parker v. Brown, 317 U.S. 341, 351 (1943) (citing 21 CONG. REC. 2457, 2459, 2461, 2562 (1890)); *see also* J. W. Stewart, *in* LEGISLATIVE HISTORY, *supra* note 17, at 332 (the Sherman Act's "only object was the control of trust, so called, so far as such combinations in their relation to interstate trade are within the reach of Federal legislation").

independent businesses from becoming 'associates' in a common plan that is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."[175] Early commentators made similar pronouncements.[176]

The rationale for this congressional assault on concerted action supports the conclusion that unilaterally imposed tying arrangements were not intended to fall within Section One. Congress was concerned with contracts and combinations between would-be competitors because such contracts permitted businesses to concentrate economic power and wield it in a concerted manner.[177] The concentration of market power is dangerous because the businesses can exercise

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[175] Associated Press v. United States, 326 U.S. 1, 15 (1945). The language and tenor of early Supreme Court cases confirm that the thrust of the Sherman Act was to prevent contracts between competitors, not regulate contracts between a buyer and a seller. For example, in 1899, the Supreme Court articulated:

> We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made.

Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 244 (1899).

[176] *See* Herbert Pope, *The Legal Aspect of Monopoly*, 20 HARV. L. REV. 167, 187 (1907) ("To be illegal, the combination must rest upon an understanding or *agreement between actual competitors* who, by removing competition between their established independent enterprises, are able at the time to control the market or industry in which they are engaged.") (emphasis added); *see also* LEGISLATIVE HISTORY, *supra* note 17, at 30 ("In sum, the proscription in section 1 of the Sherman Act against contracts, combinations, and conspiracies in restraint of trade looks to concerted activity and agreement *among competitors*.") (emphasis added).

[177] Representative George noted:

> It is well known that the great evil of these combinations, these conspiracies, as they are called, these monopolies, as they are denominated by the bill, consists in the fact that by combination, by association, there have been gathered together the money and the means of large numbers of persons, and under these combinations, or conspiracies, or trusts, this great aggregated capital is wielded by a single hand and guided by a single brain, or at least by hands and brains acting in complete harmony and co-operation, and that in this way, by this association, by this direction of this immense amount of capital, by one organized will, to a very large extent, these wrongs have been perpetrated upon the American people.

Representative George, *in* LEGISLATIVE HISTORY, *supra* note 17, at 284. The Supreme Court has noted "that Congress feared the concentrated power of business organizations to dominate markets and prices." Ramsey v. United Mine Workers of Am., 401 U.S. 302, 313 (1971) (quoting Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 811 (1945)).

their concentrated market power against consumers, who would have fewer (and, in some cases, no) alternative suppliers from whom to purchase their products on competitive terms.[178] When a buyer purchases a bundle of products from a single seller acting unilaterally, there is no concentration of market power.[179] The buyer and seller are not combining their market power against a third party; indeed they cannot because they are on opposite sides of the transaction. A contract between a seller and a buyer is not the type of concerted action that concentrates market power and thus, does not constitute concerted action as that term was intended to be interpreted under Section One.

Furthermore, evidence from subsequent antitrust debates indicates that the 1890 Congress did not believe tying arrangements were within the reach of the Sherman Act.[180] As a general rule, a statute should not be interpreted in a manner that is inconsistent with later amendments to that statute. For the purposes of tying law, the relevant amendment to the Sherman Act is the Clayton Act. Twenty-five years into the Sherman Act, Congress passed the Clayton Act, which "in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act] . . . or other existing antitrust acts . . . ."[181] In short, the Clayton Act was intended to address practices beyond

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[178] *See supra* notes 63–65 and accompanying text.

[179] While the Court has asserted that tying arrangements force consumers to abdicate "independent judgment as to the 'tied' product's merits[,]" Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13 (1984) (quoting Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 605 (1953)), this ignores the Court's insight in other cases of the economic reality that consumers evaluate the entire tied package. *See infra* notes 347–56 and accompanying text. The consumer does not abdicate her "independent judgment" about the tied product; rather, she exercises her independent judgment about the bundle.

[180] *See* Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013, 1019 (1985) ("Concern about the Sherman Act's apparent inability to reach tying arrangements was augmented by a general dissatisfaction about Supreme Court applications of the Act in other contexts.").

The same legislative intent arguments for why tying arrangements are not proscribed by Section One also apply to Section Two. After all, if Congress passed Section Three of the Clayton Act because it believed that unilaterally imposed tying arrangements were not adequately covered by the Sherman Act, then it must have thought that neither section proscribed unilaterally imposed tying arrangements. However, unlike Section One, Section Two is more clearly geared toward the category of conduct in which tying arrangements fit. Section 2 is directed against monopoly leveraging in many forms, such as price squeezes, and other unilateral conduct by which a monopolist seeks to extend monopoly power in one market into another. Unlike current Section One case law, evaluating unilaterally imposed tying arrangements under Section Two does no damage to the integrity of the statutory scheme; it does not create absurd anomalies or tortured reading of statutory text and intent.

[181] 2 AREEDA, *supra* note 30, at 6.

the reach of the Sherman Act.[182] Section Three of the Clayton Act proscribes tying arrangements that substantially lessen competition. The congressional debate and final legislation provide two insights. First, Congress believed that tying arrangements do not fall within the Sherman Act.[183] Second, in prohibiting tying arrangements under Section Three of the Clayton Act, Congress decided not to proscribe tying arrangements that did not substantially lessen competition or tend toward monopoly. However, Section One has been used to condemn tying arrangements that affect a not insubstantial dollar volume of commerce, but that do not necessarily substantially lessen competition.[184] By using Section One of the Sherman Act to reach the precise restraints that Congress chose not to condemn in the Clayton Act, the underlying legislative intent of antitrust law is thwarted.[185]

Finally, there is nothing in the legislative debates or history of the Sherman Act that suggests Congress intended to vest federal courts with the power to review individual sales contracts to determine whether they were the result of economic duress.[186] Indeed, such a result would have represented an unacceptable federal intrusion into contract law, which continues to be predominantly the province of state law.[187] Those who believe a statute condemns an activity must bear the burden of showing that such condemnation is

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[182] *See* Bowman, *supra* note 30, at 30. Some senators believed that Section Three of the Clayton Act was unnecessary because tying arrangements could be better handled by the newly established Federal Trade Commission. *See* Kramer, *supra* note 180, at 1020–21. Other senators believed that the Federal Trade Commission would not outlaw tying arrangments because the Supreme Court had held that they do not violate the Sherman Act. *See* Standard Oil Co. v. United States, 337 U.S. 293, 297 n.4 (1949) (citing 51 CONG. REC. 14088, 14090–92, 14223 (1914)).

[183] *See Standard Oil*, 337 U.S. at 297 ("[Section Three] of the Clayton Act was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act[.]").

[184] *See infra* notes 217–29 and accompanying text.

[185] *See* West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991) ("[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone[.]"); Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.") (italics omitted).

[186] Reading the hundreds of pages of legislative debate on the Sherman Act confirms that no congressperson or senator ever mentioned tying arrangements or any form of contract between a seller and a buyer.

[187] *See* THORNTON, *supra* note 101, at 364 ("The object of the act is to protect the public against unlawful restraints of trade and commerce, not to protect individuals from the consequences of their own acts or contracts.").

consistent with the legislative intent of the underlying statute.

iv. *Summary*

Some courts have suggested that to hold that Section One does not reach unilaterally imposed tying arrangements effectively reads the word "contract" out of Section One.[188] This is wrong. Section One reaches contracts to restrain trade in the form of concerted tying arrangements. All contracts restrain trade, but not all contracts are entered with the intent or purpose of restraining trade; only the latter are proscribed by the Sherman Act. This interpretation unifies *Colgate*, *Monsanto*, and the original intent of the 1890 Congress that enacted the Sherman Act.

C. *Analyzing Unilaterally Imposed Tying Arrangements Under Section One Creates Serious Anomalies in Antitrust Law*

The wisdom of evaluating unilaterally imposed tying arrangements under Section One becomes more suspect when one considers how many anomalies are created in antitrust law by treating unilateral tie-ins as concerted action. The Sherman Act's distinction between unilateral and concerted action forms the primary foundation upon which American antitrust regulation is structured. Courts can determine whether challenged conduct more closely resembles Section One concerted action or Section Two unilateral conduct. This is possible because Section One violations share common characteristics that Section Two violations do not. This Part explains how unilaterally imposed tying arrangements do not share these Section One characteristics.

Structurally, unilaterally imposed tying arrangements do not resemble other Section One violations. With the glaring exception of tying arrangements, all Section One conduct is evaluated under a common three-prong test.[189] A tying arrangement is the only Section One cause of action with its own separate elements.[190] Some of these elements and other characteristics make tying arrangements different from all other Section One violations.[191]

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[188] *See generally* Systemcare v. Wang, 787 F. Supp. 179, 182 (D. Colo. 1995), *aff'd* 85 F.3d 465 (10th Cir. 1996), *rev'd en banc*, 117 F.3d 1137 (10th Cir. 1997).

[189] *See supra* note 85 and accompanying text. There are three basic elements: (1) agreement; (2) unreasonable restraint; and (3) interstate commerce requirement. How courts apply the second element differs depending on whether the conduct is horizontal or vertical and whether it is considered per se illegal or analyzed under the Rule of Reason. But the macro structure of the violation in terms of the three elements remains the same.

[190] *See supra* notes 86–88 and accompanying text.

[191] Unilaterally imposed tying arrangements also created an anomaly because of the

1. *Anomaly: Victim Participation Is Required*

Prohibiting unilaterally imposed tying arrangements under Section One creates an anomaly whereby conduct is not illegal unless the victim participates.[192] If a seller attempts to unilaterally impose a tying arrangement

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standards applied to evaluate them. Section One conduct is evaluated under either per se or Rule of Reason analysis. Per se rules are applied only to conduct that "facially appears to be one that would always or almost always tend to restrain competition and decrease output." Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 354 (1982); *see also* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980). Currently, the per se rule is applied to horizontal trade restraints—such as horizontal price-fixing, *see* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979), territorial and customer divisions, *see* United States v. Topco Assocs., 405 U.S. 596, 608 (1972), and bid rigging—and vertical price restraints, such as resale price maintenance, *see* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 373 (1911). However, vertical maximum resale price maintenance is now evaluated under the Rule of Reason. *See generally* State Oil v. Khan, 522 U.S. 3 (1997). In addition to horizontal and price restraints, the per se rule is applied against unilaterally imposed tying arrangements, making tying arrangements the only nonprice vertical restraints evaluated under the per se rule. Not all tying arrangements are evaluated under per se rules. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29–31 (1984); Town Sound v. Chrysler Motors, 959 F.2d 468, 482–83 (3d Cir. 1992) (showing that absent proof of market power, tie-ins are analyzed under the Rule of Reason). *But see* Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 761 (7th Cir. 1996) (stating that the market power is necessary under Rule of Reason). In reality, even those tying arrangements allegedly analyzed under per se rules are not per se illegal.

This anomaly is not serious because unilaterally imposed tying arrangements, even if evaluated under the Rule of Reason, would still be proscribed under Section One. Nonetheless, analyzing tying arrangements under the rubric of per se rules is inconsistent with the entire rationale of per se analysis in antitrust. For example, one purpose of the per se rule is that courts do not have to look at specific issues like market power. But market power is an element of a per se illegal tying arrangement. No other per se category of anticompetitive conduct requires a showing of market power.

This anomaly further shows the usefulness of distinguishing between unilateral and concerted tying arrangements. While applying the per se rule to unilaterally imposed tying arrangements creates inconsistencies within Section One, the per se rule against tying arrangements makes sense if applied to concerted tying arrangements. To the extent that a concerted tying arrangement operates like a price-fixing scheme, *see supra* notes 37–42 and accompanying text, it should be treated like one. Otherwise, cunning cartelists could avoid per se illegality by structuring their price-fixing as tying arrangements. But a unilaterally imposed tying arrangement does not resemble price-fixing; at most, it resembles price discrimination, which of course, is not a violation of Section One.

[192] While some may claim that the excluded competing seller is the true victim, this is problematic because the letter of the tying arrangement itself is not illegal. The contract is legal if it is voluntary. It is the presence of coercion that makes it illegal. In short, a seller and buyer are free to agree that the buyer will make all of her purchases from one seller. Thus, while the excluded competitor suffers injury, he suffers no more injury than by a legal contract, which he could not challenge. It also bears noting that victim participation only applies to the contract

that the buyer rejects, then there is no agreement and no violation of Section One. In no other Section One cause of action does the victim have to agree in order for a violation to have occurred.[193] For example, no buyer has to actually buy a product at a fixed price in order for there to be a Section One violation for price fixing.

Tying arrangement case law requiring victim participation is not only anomalous, it is misguided. Relying on the contract between the buyer and seller as the requisite agreement means that a consumer must accept an onerous term in order to have a claim. Conversely, if the buyer refuses to submit, then there is no agreement and no violation. This is a bad rule of law because it is conceivable that a consumer may purchase bundled goods merely to have a legal cause of action.[194]

In any case, unilaterally imposed tying arrangements represent the only Section One violation in which the victim must participate in order for anyone—the consumer, the competitor, or the government—to have a cause of action.

2. *Anomaly: Only One Defendant Is Possible*

Related to the anomaly of victim participation is the corollary that unilaterally imposed tying arrangements represent the only Section One violation

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language of the Sherman Act, not the conspiracy language. *See supra* notes 101–08 and accompanying text.

[193] *See* John P. Ryan, Jr. & Robert C. Schnitz, *The Justice Department's Guidelines on Vertical Restraints*, 74 ILL. BAR J. 66, 72 (1985) ("Unlike most vertical restraints, the typical per se illegal tying arrangement constitutes a unilateral offense which cannot benefit the person who is being forced to buy the tied product."). However, in dicta, the Supreme Court in *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968), *rev'd on other grounds*, State Oil Co. v. Khan, 522 U.S. 3 (1997), observed that "petitioner could have claimed a combination between respondent and himself[.]" *See also* Yentsch v. Texaco, Inc., 630 F.2d 46, 51–52 (2d Cir. 1980); Arnott v. American Oil Co., 609 F.2d 873, 885 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980). *Albrecht* is distinguishable to the extent that unilaterally imposed tying arrangements create a related anomaly in that they represent the only trade restraint whereby the underlying agreement is between a seller and the ultimate consumer. (The word consumer is used to exclude a middleman, retailer, or other reseller, who may in effect be considered a "buyer" for some limited purposes.) Furthermore, victim participation is not generally required in cases of terminated dealers because "[t]he typical vertical restraint case is brought by a dealer claiming that its dealership was terminated pursuant to an illegal conspiracy between its supplier and competing dealers." Marc A. Fajer, *Taming the Wayward Children of* Monsanto *and* Sylvania*: Some Thoughts on Developmental Disclosure in Vertical Restraints Doctrine*, 68 TEMP. L. REV. 12, 12 (1995). Thus, the terminated dealer can prove an agreement without acquiescing herself.

[194] *See infra* note 287. *See* 10 PHILLIP E. AREEDA ET AL., ANTITRUST LAW 285 (1996) (discussing difficulty of determining whether the buyer acted "voluntarily").

in which there can be but one possible defendant, namely the seller imposing the tie. It is axiomatic that in order to have concerted action, there must be at least two actors.[195] While the buyer and seller in a tying transaction represent two separate parties, there must be more than simply two parties involved in the transaction; there must be at least two wrongdoers. The Seventh Circuit in *Contractor Utility Sales. v. Certain-teed Products*[196] explained that "[t]he fundamental prerequisite [of Section One cases] is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied."[197] Yet this "fundamental prerequisite" is simply ignored in unilateral tying cases.[198] By its concerted action requirement, Section One is intended to reach conduct if there are two culpable parties engaging in anticompetitive conduct, not merely if one party's unilaterally imposed restraint is memorialized in a contract.[199] Because unilaterally imposed tying arrangements have only one culpable party, evaluating them under Section One creates a serious anomaly.

This anomaly presents another opportunity to distinguish the coerced agreements found in some vertical distribution relationships from the coercion found in tying arrangements.[200] In those cases in which a coerced agreement has been held to satisfy the concerted action requirement of Section One, both parties to the coerced agreement were potential defendants.[201] But in a unilaterally imposed tying arrangement, only one-half of the coerced agreement, the seller, is liable under antitrust laws. In contrast, in non-tying cases involving coerced agreements courts have generally reached one of two holdings: (1) the coerced agreement is still an agreement and both parties are potential defendants; or (2) the coerced agreement is not an agreement and neither party is liable. Only in the

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[195] *See* Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1160 (9th Cir. 1988); LEGISLATIVE HISTORY, *supra* note 17, at 31 ("Section 1 applies only to concerted activity between two or more persons . . . .").

[196] 638 F.2d 1061 (7th Cir. 1981), *cert. denied*, 470 U.S. 1029 (1985).

[197] *Id.* at 1074; *see also* McKenzie v. Mercy Hosp., 854 F.2d 365, 367 (10th Cir. 1988) (citation omitted).

[198] *Compare* City of Chanute v. Williams Natural Gas Cos., 955 F.2d 641, 650 (10th Cir. 1992) (noting the absence of a second defendant in holding that there was no concerted action to bring the tying arrangement within Section One), *overruled by* Systemcare, Inc. v. Wang Labs. Corp., 117 F.3d 1137, 1145 (10th Cir. 1997) (en banc) (holding that a contract between a buyer and seller satisfies the concerted action element of Section One when the seller coerces a buyer's acquiescence in a tying arrangement imposed by the seller).

[199] *Cf. infra* notes 281–312 and accompanying text (explaining that if concerted action includes unilaterally imposed restraints, Section One would swallow much of Section Two conduct).

[200] *See supra* notes 166–71 and accompanying text.

[201] *Cf. supra* notes 153–59 and accompanying text.

context of a unilaterally imposed tying arrangement is one party to a coerced agreement deemed liable and the other party deemed not liable as a matter of law.[202] This creates a suspicious anomaly in antitrust law.

3. *Anomaly: Coercion Is Required*

The third anomaly caused by evaluating unilaterally imposed tying arrangements under Section One is the requirement of forcing or coercion. The Supreme Court has explained that coercion is the essence of tying. In *Times-Picayune Publishing Co. v. United States*,[203] the Court noted that "[b]y conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market."[204] The Court noted that the "common core" of a tying arrangement "is the *forced* purchase of a second distinct commodity."[205] Similarly, in *Jefferson Parish*, the Court observed:

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[202] Although there exist vertical restraint cases under Section One in which there has been one defendant, the challenged restraint did not have one defendant as a matter of law. For example, in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), and *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968), the Court implied that the downstream distributor in a vertical price-fixing arrangement could sue its upstream supplier under Section One. In such a case, one party to the illegal contract is suing the other party and thus, there is one defendant. But this is fundamentally different from unilateral tying cases; in the vertical price restraint cases, there are at least two potential defendants, the upstream and the downstream supplier. If a consumer who purchased the product at the fixed price brought suit, she could sue both parties to the agreement (even if the downstream producer only reluctantly agreed to the scheme). In contrast, in unilateral tying cases there is inherently only one possible defendant. No matter who initiates litigation, courts would not allow a plaintiff to sue the consumer who bought the bundled products.

Similarly, although other vertical restraint cases may have only one defendant, that may represent a litigation strategy by the plaintiff or the second defendant's exit from the litigation (either through settlement or a decision not to appeal). For example, there was but one apparent defendant in *Business Electronics v. Sharp Electronics*, 485 U.S. 717 (1988), namely the manufacturer, Sharp. However, the terminated dealer based its complaint on Sharp's alleged agreement with another dealer, Hartwell, to terminate the plaintiff. *See Business Electronics*, 485 U.S. at 721. Thus, although there was only one defendant before the Court, the underlying facts presented two potential defendants—Sharp and Hartwell—whom the plaintiff alleged to have entered into an illegal agreement in restraint of trade.

[203] 345 U.S. 594 (1953).

[204] *Id.* at 605 (emphasis added).

[205] *Id.* at 614 (emphasis added).

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.[206]

While anomalous, the requirement of coercion makes sense in the context of unilateral tying arrangements because absent coercion, a buyer could legally agree with her supplier to purchase a bundle of goods. Such a voluntary transaction need not have an adverse impact on competition.[207] In contrast, coercion should not be a requirement for other Section One combinations (or for concerted tying arrangements) because even absent coercion a distributor is not permitted to agree with a manufacturer on what specific price to charge buyers.[208] In short, coercion is required before condemning a unilaterally

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206 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). Consistent with the Supreme Court's language in *Jefferson Parish*, the vast majority of circuits hold that in order to be liable for a Section One violation, a defendant must have coerced a buyer into purchasing a product that she did not want. *See, e.g.*, Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1577 (11th Cir. 1991) (stating that plaintiffs must show that defendant wielded market power to force real estate brokers to alter choice of professional associations); Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 991 (4th Cir. 1990) ("[T]he seller must coerce the buyer into purchasing the tied product."); H.J., Inc. v. ITT, 867 F.2d 1531, 1542 (8th Cir. 1989) ("Coercion is an essential element of a tying claim."); Foremost Pro Color v. Eastman Kodak Co., 703 F.2d 534, 540 (9th Cir. 1983) ("A significant element of an illegal tying arrangement is coercion by the seller"); Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982); Shop & Save Food Markets, Inc. v. Pneumo Corp., 683 F.2d 27, 30 (2d Cir. 1982); Betaseed, Inc. v. U & I, Inc., 681 F.2d 1203, 1215 (9th Cir. 1982); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1352 n.8 (9th Cir. 1982); Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 (5th Cir. 1981) ("[A]ctual coercion is an indispensable element of a tie-in charge."); Yentsch v. Texaco, Inc., 630 F.2d 46, 56–57 (2d Cir. 1980) ("The law of tying requires proof of... actual coercion by the seller[.]"). Although a minority of courts have held that proof of coercion is not required, *see, e.g.*, Bell v. Cherokee Aviation Corp., 660 F.2d 1123, 1130–32 (6th Cir. 1981); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 450 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), such holdings are in doubt after *Jefferson Parish*. However, at least one court has interpreted *Jefferson Parish* as not requiring coercion as an element of a tie-in arrangement claim, but rather as "simply a manifestation of market power." Casey v. Diet Ctr., 590 F. Supp. 1561, 1566 n.8 (N.D. Cal. 1984). But again, the majority of courts seem to have interpreted *Jefferson Parish* as requiring proof of coercion or forcing. *See, e.g.*, Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 882 (D. Del. 1987).

207 *See* Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1225–26 (3d Cir. 1976), *cert. denied*, 429 U.S. 323 (1976).

208 This would constitute vertical price fixing, which violates the Sherman Act. *See generally* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

imposed tying arrangement lest antitrust law criminalize an entire category of mutually beneficial sales contracts.

But while the coercion requirement makes sense if one is going to punish unilaterally imposed tying arrangements under Section One, that same requirement also compels the observer to question the premise that unilaterally imposed tying arrangements should be evaluated under Section One at all. The coercion requirement provides two insights. First, it illustrates another anomaly created by the current treatment of unilaterally imposed tying arrangements. While some non-tying cases have allowed coerced conduct to satisfy the concerted action requirement,[209] no other Section One violation actually requires coercion as an element. Second, the anomaly highlights the fact that requiring coercion for a Section One violation stretches the concept of agreement as that term is traditionally employed. The fact that one party must, as a matter of law, be forced or coerced suggests lack of agreement since agreement usually implies lack of force.[210]

4. *Drawing Inferences from Anomalies*

In sum, analyzing unilaterally imposed tying arrangements under Section One creates a series of anomalies, which at a minimum demonstrate that this cause of action does not look like other Section One violations. This forces one to consider whether Section One provides the appropriate framework to evaluate unilateral tying arrangements, especially because these anomalies do not exist if unilaterally imposed tying arrangements are analyzed under Section Two of the Sherman Act[211] or Section Three of the Clayton Act.[212] For instance, Section Two conduct usually has only one defendant and often requires some form of coercion—usually the exercise of monopoly power. Furthermore, victim

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[209] *See, e.g.*, MCM Partners, Inc. v. Andrews-Bartlett & Assoc., 62 F.3d 967, 975 (7th Cir. 1995) ("So long as defendants knew that they were acquiescing in conduct that was in all likelihood unlawful, we have no difficulty concluding that they thereby joined a combination or conspiracy for which they can be held accountable under section 1."); Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1163 (7th Cir. 1987), *cert. denied*, 486 U.S. 1003 (1989) ("[A]n agreement procured by threats is still an agreement for purposes of Section 1.").

The rationale applied in these cases does not apply to litigation concerning unilaterally imposed tying arrangements because the consumers buying bundled goods do not know that they are engaging in unlawful conduct. Indeed, their conduct is not unlawful because it is not illegal to buy bundled goods.

[210] A reluctant agreement is not "forcing"; therefore, a reluctant agreement by a retailer to follow the manufacturer's directive is different from a buyer submitting to a tying arrangement. *See supra* notes 153–60 and accompanying text discussing *Monsanto*.

[211] *See infra* Part V.B.

[212] *See infra* Part V.C.

cooperation would not be required if unilateral tie-ins were treated under Section Two.

Additionally, it is significant that these anomalies disappear if: (1) courts make the distinction between unilateral and concerted tying arrangements; and (2) only the latter are considered under Section One. To punish concerted tying arrangements under Section One, the victim would not have to participate because the concerted action requirement would be satisfied by the two businesses implementing the tie-in. Similarly, the existence of these two businesses acting in concert would provide for two or more defendants. Finally, no coercion element would be necessary when a tying arrangement is concerted because it is jointly imposed by two competitors.[213] To the extent that a concerted tying arrangement represents a form of hidden price fixing or concerted refusal to deal, there is no need to require coercion. Thus, recognizing the distinction between unilateral and concerted tying arrangements would restore consistency to Section One by insuring that only truly concerted action fell within its reach, thereby eliminating the need for the anomalous coercion requirement.

IV. UNILATERALLY IMPOSED TYING ARRANGEMENTS SHOULD BE TREATED AS UNILATERAL CONDUCT

Although unilaterally imposed tying arrangements are currently evaluated as concerted action under Section One of the Sherman Act, this Article argues that they should be treated as unilateral conduct. The thrust of the argument is that a claim based on a unilaterally imposed tying arrangement more closely resembles unilateral conduct under Section Two than concerted action under Section One.[214]

This Part advances four arguments. First, the current Section One test for tying does not require that competition be affected before condemning the challenged tie-in. Treating unilaterally imposed tying arrangements as unilateral action under either Section Two of the Sherman Act or Section Three of the

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[213] *See supra* notes 37–62 and accompanying text.

[214] For example, the Seventh Circuit has observed that "[t]ying is not cooperation among competitors, the focus of § 1[;] it is aggressive conduct akin to monopolization under § 2 of the Sherman Act." Will v. Comprehensive Accounting Corp., 776 F.2d 665, 669 (7th Cir. 1985).

Under current law, a claim alleging a tying arrangement can be brought under either Sections One or Two of the Sherman Act or Section Three of the Clayton Act. While plaintiffs sometimes bring tying claims under multiple sections, *see, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958), given a choice most plaintiffs would much rather pursue their claim pursuant to Section One because, assuming concerted action, it is significantly easier to prevail under Section One. *See infra* Parts V.B & V.C.

Clayton Act insures that competition is injured before a unilateral restraint is condemned. Second, treating the economic power to force a tie-in as akin to monopoly power insures that the coercion requirement is meaningful. Third, the failure to treat unilaterally imposed tying arrangements as unilateral conduct creates serious doctrinal inconsistencies in Section Two law and invites litigants to circumvent the higher liability of thresholds of Section Two by characterizing much Section Two conduct as a Section One violation. Finally, conceptually, a tying arrangement imposed by a single seller looks more like Section Two conduct or like tying under Section Three of the Clayton Act.

A. *Evaluating Unilaterally Imposed Tying Arrangements as Unilateral Conduct Is More Consistent with the Antitrust Requirement That Competition Be Substantially Lessened*

The essence of antitrust law is the protection of competition.[215] Concerted action is proscribed under Section One not merely because it is unreasonable in the abstract, but because it injures competition. Unilateral conduct is proscribed under Section Two only when it threatens, creates, or maintains a monopoly because monopolization is antithetical to competition. Protecting the competitive process is the touchstone of all antitrust inquiries. However, current Section One tying law does not share the same focus on competitive conditions and market structure that represents the core of most antitrust violations.

The current Supreme Court test for tying under Section One does not require a meaningful inquiry into the effect of any particular tying arrangement on actual competition in the market for the tied product.[216] Tying arrangements are illegal under Section One so long as a "not insubstantial" volume of the tied product market is affected.[217] This test is not difficult to satisfy and does not sufficiently

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[215] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[216] *See* 9 AREEDA, *supra* note 30, at 27 (tying has "a most peculiar per se rule: It appears to exclude only attention to harmful effects"); John F. Hornick, *The Per Se Rule in Tying Contexts: A Critical View*, 10 DEL. J. OF CORP. L. 703, 709 (1985) ("The most important attribute of the per se standard, as it applies to tying arrangements, is that a showing of anticompetitive effect is not required and need not even be addressed."). Although some circuits list competitive injury as an independent element, *see, e.g.*, Yentsch v. Texaco, Inc., 630 F.2d 46, 56–57 (2d Cir. 1980), most courts do not perform a separate inquiry into the competitive impact of a challenged tie-in, nor has the Supreme Court endorsed one.

[217] 9 AREEDA, *supra* note 30, at 94. Originally, the "not insubstantial volume" requirement was meant to satisfy the interstate commerce requirement. But now the requirement is often stated without reference to interstate commerce. (Indeed, because the interstate commerce requirement has lost much of its teeth, this requirement is often presumed and usually not discussed at all.) The element has remained; however, its purpose has shifted. Now it is used as a mechanism for showing that competition has been restrained. The thinking

require that competition be injured. The test is measured in dollar terms.[218] Courts have held that dollar amounts as low as $10,000 satisfy the requirement.[219] The Ninth Circuit recently held that a single tied sale of $100,000 to one consumer satisfies the "not insubstantial" requirement.[220] While such a holding presents a low threshold, it is consistent with the Supreme Court's direction that the amount of competition affected need only be "substantial enough in terms of dollar-volume so as not to be merely de minimis . . . ."[221] In short, the "not insubstantial volume" test does not have many teeth.[222]

Antitrust law traditionally measures market power and effect on competition in terms of market share. A seller with low market share presumptively enjoys little market power and therefore is in less of a position to inhibit competition. Decades of caselaw and hundreds of antitrust cases recognize that market share is the single most appropriate currency by which to measure competitive effects.

Current tying law, however, does not use market share to evaluate whether a challenged restraint has substantially lessened competition.[223] As the Supreme

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of the current regime is that if a not insubstantial dollar volume of commerce in the tied product is affected, then competition is substantially lessened. *See* Hornick, *supra* note 216, at 710 n.35 ("Athough the Court [in *Jefferson Parish*] uses the word 'substantial,' the four Supreme Court cases which it cites as support use the term 'not insubstantial.' Thus, 'not insubstantial' is probably still the standard[.]").

[218] *See* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969).

[219] *See* Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1419 (11th Cir. 1987) ($10,091.07 is not insubstantial); *see also* United States v. Loew's, Inc., 371 U.S. 38, 49 (1962) ($60,800 is "not insubstantial"); Microbyte Corp. v. New Jersey State Golf Ass'n, 1986-2 Trade Cas. ¶ 67,228, at 61,163 (D.N.J. 1986) (stating that $27,264 is not de minimis). *But see* M. Leff Radio Parts, Inc. v. Mattel, Inc., 706 F. Supp. 387, 399 (W.D. Pa. 1988) ($12,000 is insubstantial in a multibillion dollar industry); I. Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868, 875 (S.D.N.Y. 1973) ($31,000 is insubstantial).

[220] *See* Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1424–26 (9th Cir. 1995); *cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984) ("If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of the antitrust law . . .").

[221] *Fortner I*, 394 U.S. at 501. *See also* 9 AREEDA, *supra* note 30, at 31 (describing "not insubstantial volume of commerce" requirement as "a de minimis test").

[222] Some courts require that a "substantial volume" of the tied product market be affected, using the standards "substantial" and "not insubstantial" as if they were synonymous. Regardless of the nomenclature, the test has minimal rigor.

This is ironic given that tying arrangements were initially condemned because they threatened actual monopolization of the market for the tied product. Earlier cases dealt with tying arrangements that were creating monopolies, not merely restraining competition. *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947).

[223] *See* Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1425 (9th Cir. 1995)

Court explained in *Fortner I*,[224] "[t]he requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie . . . ."[225] From the fact that a minimal dollar volume of the tied product is affected, the destruction of competition is presumed.[226] Thus, under Section One analysis, the dollar volume affected in the tied product market, untethered to any inquiry into market share, is the sole indicator of whether competition is stifled by a unilaterally imposed tying arrangement.

Relying on the dollar value of the tied product affected provides no insights into the competitive process and whether that process is broken.[227] For example, if ABC Corporation loses $50,000 worth of business (to a tying competitor) in a multibillion dollar market, the tying arrangement probably has no meaningful

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(discussing *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), and its holding that "the 'not insubstantial' element" does not "include[ ] a requirement that a substantial portion of the market in the tied product be affected."); *cf.* 15 U.S.C. § 14 (1994) (Section Three of the Clayton Act).

224 394 U.S. 495 (1969).

225 *Id.* at 501; *see also* Shafer v. Bulk Petroleum Corp., 569 F. Supp. 621, 627 (E.D. Wis. 1983) (stating that the "not insubstantial" amount of commerce requirement is "not necessarily dependent on market shares"). For support, the *Fortner I* Court cited *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1957), and *International Salt*, 332 U.S. 392 (1947). *See Fortner I*, 394 U.S. at 418, 499, 503. Yet, these are all cases in which there was market dominance; the Court simply defined the relevant market so narrowly that it made the defendant's product in each case almost a market unto itself.

226 *See International Salt*, 332 U.S. at 398; *see also* Byron A. Bilicki, *Standard Antitrust Analysis and the Doctrine of Patent Misuse: A Unification Under the Rule of Reason*, 46 U. PITT. L. REV. 209, 228 (1984). Bilicki states:

> [T]he holding in International Salt amounts to a per se ruling in that anticompetitive effects were presumed from foreclosure of a certain dollar volume. The Court neither considered the availability of satisfactory substitutes for the patented machines nor the market share possessed by the patentee. Similarly, the Court deemed it irrelevant that there was no evidence of the actual effect of the tying clauses upon competition.

Id.

227 The Supreme Court has acknowledged that numbers alone, without competitive context, are illusory. Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 (1953) ("Obviously no magic inheres in numbers; 'the relative effect of percentage command of a market varies with the setting in which that factor is placed.'") (quoting United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948)); *see also* HOVENKAMP, *supra* note 34, at 352 ("The rule [using dollar amount] seems to be one of those rather silly requirements thought up with no good reason articulated in support of it, but from which the lower courts rarely deviate.").

effect on competition. However, if ABC Corp. were to lose that same amount of business in a half-million dollar market, the injury to competition is significant. The same fifty thousand dollar loss has extremely different implications for the competitive landscape, depending on the size of the overall market in which the loss occurs.

Only one statistic tells how important, from a competitive harm viewpoint, that a $50,000 loss is: market share. In the first hypothetical, ABC Corp. has lost less than one one-thousandth of one percent of the available market. In the second scenario, ABC Corp. has lost 10% of the available market. There is clearly a significant difference in the competitive impact. The former loss is trivial, the latter is consequential. Merely examining the lost volume in dollars is not particularly helpful in determining the effect on competition of a tying arrangement.[228] Examining the percentage of the available market foreclosed provides a substantially more meaningful measurement of the injury to the competitive process.[229]

Evaluating unilaterally imposed tying arrangements under Section Two of the Sherman Act or Section Three of the Clayton Act provides the proper focus on market share and, therefore, competition. For example, Section Two uses market share to determine whether anticompetitive conduct should be condemned as an unlawful acquisition or exercise of monopoly power.[230] No Section Two liability is imposed without an elaborate inquiry into the defendant's market share, which is the single most appropriate measurement for competitive injury.

In the same vein, evaluating unilaterally imposed tying arrangements under Section Three of the Clayton Act guarantees a more meaningful inquiry into the anticompetitive effects of any given tie-in. The only explicit prohibition of tying arrangements in any federal antitrust statute[231] is in Section Three, which

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228 The Supreme Court in *Fortner I* basically conceded half of this argument when it stated that "analysis of market shares might become relevant if it were alleged that an apparently small dollar-volume of business actually represented a substantial part of the sales for which competitors were bidding." 394 U.S. at 501.

229 *See* HOVENKAMP, *supra* note 34, at 352 ("To the extent that tying law is concerned with limits on competition facilitated by foreclosure or increased collusion, the correct number should be some *percentage* of a relevant market foreclosed by the arrangement."). By way of comparison, European competition authorities are unlikely to attack a tying arrangement unless a significant percentage of the market is foreclosed. *See* James D. Veltrop, *Tying and Exclusive Purchasing Arrangements Under EC Competition Law*, 31 COMMON MKT. L. REV. 549, 550 (1994); *see also id.* at 552 ("[I]n the absence of genuine foreclosure effects . . . the market will correct deficiencies so long as competitors and consumers have alternatives[.]").

230 *See e.g.*, R.C. Bigelow v. Unilever, 867 F.2d 102, 104 (2d Cir. 1989); Health Care Equalization Comm. v. Iowa Med. Socy., 851 F.2d 1020, 1028 (8th Cir. 1988).

231 Despite Section Three's explicit proscription of tying arrangements, the vast majority

provides in relevant part:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale of contract for sale of goods . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such . . . condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.[232]

By its clear text, the Clayton Act requires that the challenged tying arrangement "substantially lessen competition or tend to create a monopoly in any line of commerce." Thus, a tie-in must have a significant impact on competition before it will be condemned under Section Three.[233] Like Section Two, Section Three uses market share, not dollar volume, to determine whether

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of tying arrangements are evaluated under Section One of the Sherman Act, not Section Three of the Clayton Act. *See* Kramer, *supra* note 180, at 1037 (noting that "all of the tying arrangements reviewed in opinions of the Court since *International Salt* have involved Sherman Act challenges"). The reason plaintiffs prefer Section One over Section Three is readily apparent; Section One has a much lower threshold for liability because the plaintiff does not have to show a substantial injury to the competitive process. Section Three also has more limited coverage than Section One, in that, unlike the Sherman Act, the Clayton Act does not cover services. This limitation of the Clayton Act could be dispositive in many cases. For example, because the tied product in *Kodak* was services, the tying arrangement would not violate the Clayton Act. In such an instance, the reasonable plaintiff would certainly bring suit under the Sherman Act, independent of the lower injury threshold.

[232] 15 U.S.C. § 14 (1994). Section Three, in its entirety provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale of contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Id.

[233] *Cf.* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1961) (declining to condemn exclusive dealing arrangement under Section Three of the Clayton Act absent proof of substantial market foreclosure and injury to competition).

competition has been injured.[234]

In sum, reviewing unilateral tying arrangements under Section Two of the Sherman Act or Section Three of the Clayton Act would better insure that a tying arrangement actually threatened competition and would protect those unilateral actions that do not injure competition.

B. *Analyzing Unilaterally Imposed Tying Arrangements as a Unilateral Restraint Under Section Two Provides the Proper Focus on Monopoly Power*

A Section One tying claim requires the plaintiff to show that the defendant has sufficient economic power in the tying product market to force consumers to accept the alleged tying arrangement.[235] Courts refer to this market power requirement by many different names, including "sufficient economic power,"[236] "appreciable economic power,"[237] and sometimes simply "market power."[238] The rationale of the sufficient economic power requirement is that absent such power, the defendant is not distorting competition by foreclosing consumers' access to either the tying or tied product.[239]

Although the Supreme Court has identified three principal sources of market power for tying purposes,[240] it has not articulated a meaningful standard as to what constitutes sufficient economic power to force a tie. For example, courts generally do not engage in any rigorous discussion of the relevant product market in tying cases despite the fact that in other contexts the Supreme Court has made clear that "[w]ithout a definition of that market there is no way to

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234 *See infra* notes 389–398 and accompanying text.

235 *See generally* United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495 (1969). Some circuits hold that the threshold requirement that a defendant should have substantial market power in the tying product is only applicable if the plaintiff wants to proceed on a per se theory. *See, e.g.*, Breaux Bros. Farms, Inc. v. Teche Sugar Co., 21 F.3d 83, 87 (5th Cir. 1994); Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 799 (1st Cir. 1988). *But see* Hardy v. City Optical, Inc., 39 F.3d 765, 767 (7th Cir. 1994) (holding that "substantial market power is a threshold requirement of all rule of reason (as well as some per se) cases.").

236 *See, e.g.*, *Fortner I*, 394 U.S. at 502; White Motor Co. v. United States, 372 U.S. 253, 262 (1963) (citation omitted); United States v. Loew's, Inc., 371 U.S. 38, 47 (1962); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958).

237 *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462 (1992); *Fortner II*, 429 U.S. at 611–12.

238 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–14 (1984).

239 *See* Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1224, 1226 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

240 *See infra* note 250 and accompanying text.

measure [a defendant's] ability to lessen or destroy competition."[241] Because there is not a coherent test (or even competing tests) for determining when a seller has such "sufficient economic power" to force consumers to accept a tie-in, this important requirement is not built on a sound foundation. In many ways, it is basically a standardless standard.

The most appropriate test to determine whether any individual seller has sufficient market power to force consumers to accept a tie-in is the "monopoly power" standard of Section Two jurisprudence. First, a strong argument can be made that the ill-defined sufficient economic power standard of Section One tying cases is best characterized as the "monopoly power" element of Section Two law. Monopoly power is "the power to control market prices or exclude competition."[242] To the extent that monopoly power is the power to exclude competition, then the power to force a tie-in is monopoly power. After all, the primary justification for proscribing tying arrangements is that they exclude competition in the market for the tied product.[243] Whatever the source of its market power,[244] a seller needs monopoly power to eliminate this competition. Absent monopoly power in the tying product market, a seller does not have sufficient economic power to impose a tying arrangement on an unwilling consumer. As long as the seller imposing the tie-in is not the only supplier of the tying product, the consumer can turn to alternative suppliers.[245] An example

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241 Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965). An example of imprecise market definition can be found in *United States v. Loew's, Inc.*, 371 U.S. 38, 47–48 (1962), in which the Court found "sufficient economic power" without clearly articulating the relevant product market or what the defendants' market shares were. The Court found market power based on the existence of a copyright. *See id.* at 48. Many commentators have argued that economic theory precludes such a presumption. *See* J. Dianne Brinson, *Proof of Economic Power in a Sherman Act Tying Arrangement Case: Should Economic Power Be Presumed When the Tying Product Is Patented or Copyrighted?*, 48 LA. L. REV. 29 (1987); Melissa Hamilton, *Software Tying Arrangements Under the Antitrust Laws: A More Flexible Approach*, 71 DENV. U. L. REV. 607, 626–31 (1994); William Montgomery, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, 85 COLUM. L. REV. 1140, 1141 (1985). Such a flawed connection could not be imposed if plaintiffs (and courts) had to define the relevant market (based on reasonably interchangeable products) and then determine the defendant's market share and market power in that defined market.

242 United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). Because price and competition are inherently intertwined, the inquiry often focuses on the issue of ability to raise prices. *See id.* at 391–92.

243 *See supra* notes 26–27 and accompanying text.

244 *See infra* note 250 and accompanying text (detailing Court-identified sources of economic power to force a tie-in).

245 *See* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 8.10 at 238 (1985). ("[A] perfect competitor could not coerce any buyer into taking anything."). Of course,

illustrates the point: a seller has 60% of the market and she imposes a tying arrangement on a buyer. In order to buy her widgets, the buyer must also buy his cogs from the dominant widget seller. If the buyer does not want to buy cogs from the dominant widget seller, then he can simply buy his widgets from one of the sellers who supplies the remaining 40% of the market.[246] So long as there are alternative suppliers, a seller cannot force a buyer to purchase a tied product against her will.[247] In the absence of monopoly power, market discipline should prevent a seller from imposing a tie-in because the buyer could simply purchase the tying product from another seller.[248] Finally, the Supreme Court itself has

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this option is not available if the dominant seller has cajoled alternative suppliers into not assisting consumers in their end-run around the tying arrangements. That is why this form of concerted tying arrangement is so dangerous to competition. *See supra* notes 60–62 and accompanying text.

[246] The only reason he would not be able to buy from another seller is if the competing widgets would not meet his purposes or were somehow inaccessible. But, this would mean that the dominant widget seller in fact had a monopoly over the relevant product and geographic markets.

[247] Some commentators have argued that monopoly power is not necessary if the seller charges less than the competitive price for the tying product. *See* W. David Slawson, *Excluding Competition Without Monopoly Power: The Use of Tying Arrangements to Exploit Market Failure*, 36 ANTITRUST BULL. 457, 474–75 (1991). Slawson's argument is inconsistent with even the current test for tying because it suggests any seller can successfully implement a tying arrangement, regardless of market power or the competitiveness of the particular market. *See id.* at 479 ("[B]uyers are not necessarily more coerced when sellers have monopoly power than when a market is perfectly competitive."). Independent of these questionable assertions, the anticompetitive conduct at the heart of the seller's scheme in such a case is predatory pricing, not tying. Finally, all of the arguments questioning the viability of predatory pricing as a business strategy apply doubly when a seller is trying to leverage between two markets, neither of which she has market power in.

[248] *See* Bowman, *supra* note 30, at 31 ("A tie-in is a useless device unless the supplier possesses substantial monopoly over the tying product."). Scholars consistently suggest that the tying seller must possess monopoly power to impose a tie-in. *See, e.g.*, Bowman, *supra* note 30, at 20 ("To sell or lease one commodity, the tying product, advantageously on condition that it be used with another commodity, the tied product, requires the existence of monopoly power . . . ."); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 546 (1985) ("[T]o extend monopoly from one market to another, there must be some monopoly in the first market to begin with."); *see also* M. L. Burstein, *A Theory of Full-Line Forcing*, 55 NW. U. L. REV. 62 (1960) (assuming implicitly that the tying seller is a monopolist).

Even if the seller imposing the tie-in is a monopolist, consumers can decide to forego their purchase altogether. (This is not a viable alternative in markets that have relatively inelastic demand.) Consumers always act as the free market's check on monopolist behavior because, absent noneconomic coercion, they pick and choose which transactions to enter. If they believe the price is too high then they will make the purchase from someone else. Agreements between businesses are bad because they diminish the ability of the consumer to negotiate one-on-one acknowledged that the power to impose a tie-in is, in fact, monopoly power.[249]

Second, the oft-cited examples of the market power sufficient to coerce a tie-in are all instances of monopoly power. The Supreme Court has articulated three sources of market power sufficient to coerce consumers to accept a tie-in: "a patent or similar monopoly over a product, ... the seller's share of the market is high, ... [and] the seller offers a unique product that competitors are not able to offer[.]"[250] Each of these sources is tantamount to monopoly power, as that concept is applied in Section Two analysis. First, by the Court's own language, it is clear that the Court considered "a patent or similar monopoly" to constitute monopoly power.[251] For the first half century of the Sherman Act's existence, a

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with the seller. This is true because the other sellers, with which this seller has entered into an agreement, are having an influence on the transaction. Thus, the mere existence of some market power in a tying product does not mean that a consumer is without options.

249 *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 464 (1992); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 504 (1969) (suggesting that the "proper focus of concern is whether the seller has the power to raise prices"); E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 260–61 (3d ed. 1998) (explaining that the Supreme Court's opinion in *IBM Corp. v. United States*, 298 U.S. 131 (1936), suggests "that without monopoly power in the tying product market, this danger [of substantially lessened competition] would not be present"); Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 3 & n.12.

Similarly, the Court's holding in *Jefferson Parish* is consistent with the argument that the Supreme Court has treated sufficient economic power to impose a tie-in as monopoly power. After all, the defendant hospital clearly had the power to force consumers to accept a tie-in as shown by the fact that the hospital did successfully impose its tying arrangement on its patients. What the hospital did not have is monopoly power and thus the Court found no illegal tying arrangement. In short, the defendant had sufficient economic power, but not monopoly power and the absence of the latter appears dispositive. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).

250 Mozart Co. v. Mercedes-Benz of N. Am., 833 F.2d 1342, 1345–46 (9th Cir. 1987) (quoting *Jefferson Parish*, 466 U.S. at 16-17), *cert denied*, 488 U.S. 870 (1988).

251 The "similar monopoly" refers to copyrighted goods. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 144 (1998); United States v. Loew's, Inc., 371 U.S. 38, 45 (1962) ("[T]he requisite economic power [for per se condemnation of a tie-in] is presumed when the tying product is patented or copyrighted.").

In reality, patents and copyrights do not confer monopoly power unless they cover a properly defined relevant market. *See generally* Brinson, *supra* note 241; Hamilton, *supra* note 241; Montgomery, *supra* note 241. Many courts now recognize that there is a distinction between a legal monopoly and an economic monopoly, and have suggested that the power to impose a tie-in cannot be inferred by the mere existence of a patent over the tying product. *See* 10 AREEDA ET AL., *supra* note 194, at 90; *see also* 35 U.S.C. § 271(d) (1994) (The Patent Misuse Reform Act eliminates any presumption that a patent alone defines a relevant market or implies market power.). The point here is not that patents and copyrights do confer monopoly power, but that the Court claims that they do; thus, the Court has equated the power to impose de facto monopoly power requirement was employed in the sense that early tying cases involved patented tying products.[252] Second, high market share is the hallmark of monopoly power.[253] Courts often rely on high market share to find economic power over the tying product.[254] Finally, the notion of "a unique product" that competitors cannot supply is simply a long-form way of saying that a product is a market unto itself over which the seller has a monopoly.[255] Indeed, the Court itself has equated this "uniqueness" with monopoly power.[256]

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a tie-in with monopoly power.

[252] *See, e.g.*, International Salt v. United States, 332 U.S. 392 (1947); IBM v. United States, 298 U.S. 131 (1936); Motion Picture Patents Co. v. Universal Film Co., 243 U.S. 502, 518 (1917); Henry v. A.B. Dick, 224 U.S. 1 (1912); *see also Loew's*, 371 U.S. at 46; Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 608–09 (1953) (suggesting that a seller must "enjoy[ ] a monopolistic position in the market for the 'tying' product" in order to violate Section One of the Sherman Act); POSNER, *supra* note 28, at 172 ("[E]arly cases required proof of monopoly power, or of some proxy therefor such as a patent, in the market for the tying product.").

[253] In monopolization cases, control of ninety percent of a market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945). While market share alone is generally not dispositive in and of itself, *see* United States v. Columbia Steel Co., 334 U.S. 495, 527–28 (1948), federal courts rely on the market-share inquiry as the "earmark of monopoly power." United States v. Paramount Pictures, 334 U.S. 131, 174 (1948).

[254] 10 AREEDA ET AL., *supra* note 194, at 87 ("[T]he few recent cases allowing a jury to find power [over the tying product] have emphasized that the defendant's share approached 100%, albeit in a relatively narrow market, or exceeded 50% when coupled with other factors indicating power.") (citations omitted).

[255] 10 AREEDA ET. AL., *supra* note 194, at 116 ("When the defendant's [tying] product is unique in that no other supplier can offer it or a reasonable substitute, it ordinarily comprises a market in itself—a market obviously dominated by the defendant with a 100 percent share."). The government in *Northern Pacific* tried to argue that the land used as a tying product was equivalent to the patented tying product in *International Salt* by initially arguing that "patents" had conferred the land on Northern Pacific. *See* Cummings & Ruhter, *supra* note 42, at 333; *cf.* United States v. Loew's, Inc., 371 U.S. 38, 48 (1962) (stating that an owner of a film library holds a "'monopolistic' position" in each film). Again, in reality, a unique product should not be considered a monopoly unless there are no reasonable substitutes, and the product constitutes a relevant antitrust market. This critical inquiry is evaded under current law because tie-ins are not treated under Section Two, which begins each analysis with an investigation into market definition.

[256] Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 505 n.2 (1969) ("Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, or physical, as when the product is land.") (citations omitted).

In short, current case law is consistent with the conclusion that the power to enforce a tie-in must be monopoly power.[257] Courts have not meaningfully distinguished the power to impose an unwanted tie-in from monopoly power.[258] Courts have not explained how the power to force a tie-in can exist absent monopoly power over the tying product. Indeed, the Supreme Court has acknowledged that "the essence of illegality in tying agreements is the wielding of monopolistic leverage[.]"[259]

If the current standard is tantamount to monopoly power, then why does it matter what the courts call it? The problem with not being explicit in equating "the power to coerce a tie" with "monopoly power" is that lower courts usually forego the market power inquiry of Section Two cases and hence, impose tying liability when monopoly power (and thus the power to force consumers to accept terms against their will) is not present.[260] Under current Section One tying jurisprudence, after reciting the requirement of market power, many courts assume it away by inferring such power from the mere existence of the tying arrangement.[261] For example, many courts assume the existence of coercion

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[257] Many tying holdings are entirely consistent with such a conclusion. For example, in *Jefferson Parish*, the Court held that a defendant with a 30% share of the market in the tying product does not have sufficient market power as a matter of law. This is similar to the conventional wisdom that a defendant in a Section Two case cannot have monopoly power with a mere 33% market share. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

[258] *See infra* notes 275–78 and accompanying text.

[259] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611 (1953).

[260] *See Loew's*, 371 U.S. at 45 n.4 (noting that because tying cases do not require a demonstration of market power as in Section Two cases, "it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product"); *see* 10 AREEDA ET AL., *supra* note 194, at 5. Areeda argues that the Supreme Court put more teeth in the sufficient economic power requirement with its decisions in *Fortner II* and *Jefferson Parish*, but that some lower courts are still too quick to find such power without adequate market analysis. *See id.* at 76–77.

[261] *See, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 7–8 (1958) ("The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power[.]"); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977); McAlpine v. AAMCO Automatic Transmissions, 461 F. Supp. 1232, 1241 (E.D. Mich. 1978) (claiming that *Fortner I* "seems to be saying that if one has imposed a tie, one had sufficient power to do so"). Perhaps the reason that some courts are so willing to infer coercion stems from the implications of any contrary finding. Whenever a court finds that a seller does not have sufficient economic power to force a tie-in, and yet a tie-in nonetheless exists, this necessarily means that the consumer, without coercion, accepted a tie-in. Such a conclusion is at odds with the deeply (though incorrectly) held notion that consumers are invariably hurt by tie-ins and that tying arrangements serve no purpose other than to stifle competition. *See* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306 (1949) ("only the prospect of

based on tying provisions in form contracts.[262]

However, the existence of a tie-in should not constitute proof that the seller is exercising market power.[263] Many tie-ins do not rely on coercion, such as tie-ins imposed by franchisors on their franchisees.[264] Furthermore, some tie-ins are desired by consumers.[265] The existence of procompetitive benefits of tying arrangements suggests that they need not be the result of coercion.[266] The potential for such benefits should counsel against knee jerk inferences of coercion because "even where a contract might be, on balance, anticompetitive, a plaintiff would not suffer antitrust injury when the presence of significant procompetitive effects suggests that the parties would have entered the very same contract absent any prospect of obtaining or exercising market power."[267] Finally, given the harsh effects of a per se rule against tying, if it is shown that the defendant has "sufficient economic power," courts should insure that this requirement is meaningful by requiring that such power be proven and substantial.[268]

In addition, explicitly acknowledging that unilaterally imposed tying arrangements involve monopoly power allows courts to exploit the ready supply of well-thought out, consistent case law of Section Two of the Sherman Act. Plaintiffs in Section Two cases must show that the defendant has improperly acquired or maintained monopoly power through anticompetitive conduct.[269] The inquiry into monopoly power is critical, and often dispositive, in Section Two litigation. To determine whether a plaintiff has proven the existence of monopoly power, courts applying Section Two analysis examine the defendant's

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reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device . . . could induce a buyer to enter one."); *see also* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 146–47 (1965) (sufficient economic power to impose a tie-in "would seem to be shown by the existence of the contract itself").

262 *See* Alan J. Meese, *Antitrust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111, 160 (1996).

263 *See* Bowman, *supra* note 30, at 29; *cf.* United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 614 (1977) (existence of tying arrangements was evidence of "appreciable economic power" to force a tie-in).

264 *See* Meese, *supra* note 262, at 128 (demonstrating that coercion is not necessary for some franchise tying arrangements).

265 *See infra* notes 365–70 and accompanying text.

266 *See* Meese, *supra* note 262, at 155.

267 *Id.* at 163–64.

268 *See* 10 AREEDA ET AL., *supra* note 194, at 66.

269 Or, in the case of attempted monopolization claims, plaintiffs must show that there is a dangerous probability that the defendant will acquire monopoly power.

market share in the relevant market,[270] the barriers to entry into that market,[271] and other circumstantial indicia.[272] The market power inquiry of Section Two jurisprudence is both rigorous and meaningful, especially when compared to the brief discussions that occur in most tying cases.[273] In short, courts have a great deal of experience in determining whether a particular defendant possesses monopoly power. Finally, and more importantly, equating the economic power requirement applied to unilaterally imposed tying arrangements with the Section Two standard insures that the requirement is meaningful.[274]

The strongest argument against the position that "sufficient economic power" is "monopoly power" is the Supreme Court's passage in *Fortner I*[275] stating that "[t]he standard of 'sufficient economic power' does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product."[276] While such language is not helpful, neither is it

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270 Monopoly power does not necessarily mean that the seller controls or supplies 100% of the market; rather, it refers to having the power to act as if one controlled 100% of the market share. Monopoly power is often defined in terms of the ability to impose a nontransitory price increase on a market. For example, a seller can be said to have monopoly power if he may increase his prices 5% above the competitive levels for a period of two years.

271 *See generally* United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922) [*United Shoe II*].

272 These include price discrimination, supra-competitive profits, excess capacity, and price trends.

273 Courts in tying cases often do a sloppy job of defining the relevant market in the first place. *See* 10 AREEDA ET AL., *supra* note 194, at 131.

274 Similarly, in determining whether competition has been substantially lessened under Section Three of the Clayton Act, courts determine the relevant line of commerce "on the basis of the facts peculiar to the case." Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). The failure of many courts to properly define the tying product market renders the market power determination meaningless. *Cf.* 10 AREEDA ET AL., *supra* note 194, at 85 ("Shares of a poorly defined market mean nothing.").

275 394 U.S. 495 (1969).

276 *Id.* at 502; *see also* United States v. Loew's, Inc., 371 U.S. 38, 45 (1962). Even the *Fortner I* dissent suggested that "monopoly power or dominance in the tying market is not necessary; it is enough if there is 'sufficient economic power to impose an appreciable restraint on free competition in the tied product.'" 394 U.S. at 510 (White, J., dissenting) (citing Times Picayune Publ'g Co. v. United States, 345 U.S. 594, 608, 611 (1953)). It bears noting that while *Times-Picayune* is cited to support the proposition that market dominance is not necessary, the Court did in fact look at market dominance in that case. *See Times-Picayune*, 345 U.S. at 610; *see also* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 11 (1957). Justine Black, writing for the Court, stated in *Northern Pacific*:

fatal. From the beginning this language has been condemned as loose and subject to misinterpretation.[277] Indeed, at its first opportunity, the Supreme Court sought to ameliorate the glaring errors of *Fortner I* by holding in *Fortner II* that the seller did not have sufficient economic power to impose a tie-in.[278] *Fortner I* illustrates the problem of not applying monopoly power analysis to tying

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> While there is some language in the *Times-Picayune* opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of per se unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on competition in the tied product.

Id.

277 *See* Kenneth W. Dam, Fortner Enterprises v. United States Steel: *"Neither a Borrower Nor a Lender Be," in* SUPREME COURT REVIEW 1, 25–26 (Philip B. Kurland, ed. 1969). Professor Dam explained the Court's language:

> One important question in interpreting the *Fortner* decision is the meaning of this language. Taken out of context, it might be thought to mean that, just as the "host of tying arrangement" was "compelling evidence" of "great power" in *Northern Pacific*, so the inclusion of tie-in clauses in contracts with "any appreciable numbers of buyers" establishes market power. But the passage read in context does not warrant this interpretation. For the immediately preceding sentence makes clear that market power in the sense of power over price must still exist.

Id. (footnotes omitted).

The Court in *Fortner II* endorsed Professor Dam's analysis of *Fortner I* as correct. *See Fortner II*, 429 U.S. at 620 n.13; *see also* Roger D. Blair & Jeffrey Finci, *The Individual Coercion Doctrine and Tying Arrangements: An Economic Analysis*, 10 FLA. ST. U. L. REV. 531, 561 (1983) (describing the language of *Fortner I* as "unfortunate"). Indeed, *Fortner I* has been attacked from many quarters as wrong. *See, e.g.*, BORK, *supra* note 28, at 368–69.

278 *See* United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 621–22 (1977); *see also* Daniel E. Lazaroff, *Reflections on* Eastman Kodak Co. v. Image Technical Services, Inc.*: Continued Confusion Regarding Tying Arrangements and Antitrust Jurisprudence*, 69 WASH. L. REV. 101, 148 n.265 (1994) ("*Fortner II*, however, cut back on an expansive use of uniqueness as a short cut to finding the requisite power [to force a tie-in]"; William Montgomery, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, 85 COLUM. L. REV. 1140, 1154 (1985) (arguing that regardless of the language of *Fortner I*, the "actual decision in [*Fortner II*] indicates that . . . the Court had already moved away from the ready willingness to find sufficient market power that it had earlier exhibited").

The language of *Fortner I* has been gutted in other indirect ways. For example, the Court in *Jefferson Parish* characterized *Fortner I* as an instance of a seller controlling a "unique product that [its] competitors are not able to offer." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 17 (1984). This is tantamount to monopoly power. *See* Brinson, *supra* note 241, at 41–42 (arguing that *Fortner II* and *Jefferson Parish* reigned in *Fortner I* and *Loew's*); *see also* Meese, *supra* note 249, at 20.

questions. The Court in *Fortner I* failed to properly define and analyze the tying product market over which the seller allegedly exerted power; if it had, it would have determined that U.S. Steel could not possibly have had economic power in the relevant market, namely credit. This is ultimately what the Supreme Court concluded in *Fortner II*, but not until after the trial court held the seller liable for imposing an illegal tie-in. The courts could have saved much time and eliminated confusion, both among the legal and business communities, by employing a traditional monopoly power inquiry.

In sum, the power to impose a tie-in is properly characterized as monopoly power because without monopoly power, a seller should not be able to truly "force" a buyer to do something that she does not want.[279] Furthermore, if this is so, then it makes much more sense to address unilaterally imposed tying arrangement either as a Section Three violation in which courts traditionally examine the relevant line of commerce or as a Section Two violation in which courts define (and justify) the relevant product market in order to determine whether a defendant has market power. In this way, courts can apply the vast body of case law discussing whether a defendant has monopoly power in a given market.[280]

C. *Failure to Treat Unilaterally Imposed Tying Arrangements as Unilateral Conduct Creates Inconsistencies Across Section Two Jurisprudence*

The current law on tying creates inconsistencies in the overall structure of

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279 Indeed, an argument can be constructed that even monopoly power is not sufficient to force or coerce a consumer to make a transaction that she does not desire. To the extent that a seller has a monopoly power if he can increase his prices to supra-competitive levels for a nontransitory period, it is debatable whether this is enough power to force a consumer to make an unwanted purchase. One can think of instances in which it would be more difficult to force a consumer to purchase an entirely separate product that she doesn't want than it would be to "force" her to pay 5% more for the one product that she did desire.

This explanation serves to question the coercion element of tying arrangements under Section One. On the one hand, it makes sense that there must be an element of coercion because if the consumer purchases a second (allegedly tied) product voluntarily, then there is no effect on the competitive marketplace. However, the power to coerce an unwanted purchase is more closely akin to monopoly power than mere market power, and this suggests that the proper statutory scheme is Section Two. If, in reality, the power to force an unwanted purchase is actually monopoly power, then we have created an anomaly in which a Section One violation requires that the defendant have monopoly power.

280 Additionally, tying arrangements can then properly be characterized as an abuse of monopoly power, a category of conduct more properly analyzed under Section Two. *See infra* notes 294–305 and accompanying text (discussing leveraging as an abuse of monopoly).

American antitrust laws by treating one category of unilaterally imposed restraints as a Section One violation. This raises the issue of why other Section Two conduct cannot be pleaded, evaluated, and proscribed as Section One conduct.[281]

Courts treat unilaterally imposed tying arrangements as a concerted restraint under Section One because the tie-in is a term of a sales contract.[282] The presence of a contract between the buyer and seller converts the unilaterally imposed condition into concerted action. If similar reasoning were applied across the board in antitrust law and unilateral conduct were treated as joint activity whenever the consumer submits to the seller's restraint of trade, Section One would swallow much of Section Two.

Many Section Two restraints are the result of a unilateral policy that is ultimately memorialized in a contract. Sometimes the policy involves coercion, but often consumers buy a monopolist's product after the seller has engaged in exclusionary or anticompetitive conduct. These sales are the culmination of an anticompetitive course of conduct; indeed, these sales (often discussed in terms of market share) are how we measure the success of the monopolist's business plan. But while these sales—which by definition are contracts and therefore concerted action—are the goal of the monopolist's policy, they do not convert the monopolist's unilaterally conceived and implemented policies into concerted action for antitrust purposes. If they did, Section Two case law would be in shambles; because they do not, current tying law is inconsistent with the remaining body of antitrust law. Several examples bear this out.

1. *Unilateral Refusals to Deal*

A unilateral refusal to deal can represent Section Two conduct.[283] As the Supreme Court noted in *Colgate*, a manufacturer or seller has a general right to decide with whom she will conduct business, so long as her purpose is not to create or maintain a monopoly.[284] But *Colgate* does not provide absolute

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[281] This argument is the flipside of the discussion of how analyzing unilaterally imposed tying arrangements under Section One creates anomalies within Section One jurisprudence. *See supra* notes 192–210 and accompanying text. Whereas the discussion of anomalies showed how treating unilaterally imposed tying arrangements as concerted action creates inconsistencies within Section One jurisprudence, this section of the Article argues that inconsistencies are also created within Section Two jurisprudence.

[282] *See supra* note 115 and accompanying text.

[283] *See generally* Oahu Gas Serv. v. Pacific Resources, Inc., 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988).

[284] *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919); *see also* Byars v. Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1980) ("[B]usiness is free to deal with whomever

immunity. For example, the Supreme Court has applied *Colgate* to hold that a defendant violates Section Two when he refuses to deal with customers who also conduct business with the defendant's competitor if the defendant's intent is to secure a monopoly.[285]

In many cases, the unilateral refusal to deal is not an outright refusal but rather is effected by the defendant demanding concessions or imposing onerous terms that the plaintiff is unwilling or unable to accept. For example, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[286] two ski facilities had issued joint lift tickets for several years. The defendant ("Ski Company") demanded a higher percentage of the revenues received from the joint lift tickets.[287] Ski Company did not expressly refuse to continue its joint ticket package; rather, it wanted to change the profit split and only after drawn-out unsuccessful negotiations did the plaintiff ("Highlands") pull out of the joint marketing arrangement. The Supreme Court evaluated Ski Company's conduct as unilateral activity under Section Two of the Sherman Act.

The challenged policy was clearly unilateral. Highlands did not accept Ski Company's terms because acceptance would have been competitively destructive to Highlands. But what if Highlands had accepted the defendant's onerous terms? Ski Company's conduct would have been precisely the same; in this scenario, only the plaintiff's behavior has changed. But now there is an agreement. Does Highlands' acquiescence suddenly transform the nature of Ski Company's conduct—which is the same in both cases—from unilateral conduct to concerted action, subject to the lower standard of liability under Section One?[288]

Unilaterally imposed tying arrangements are basically a form of unilateral

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it pleases so long as it has no 'purpose to create or maintain a monopoly[.]'") (quoting *Colgate*, 250 U.S. at 307); Healthco Int'l, Inc. v. A'dec, Inc., 1989-2 Trade Cas. (CCH) ¶ 68,703, at 61,692 (D. Mass. 1989) ("Even a firm with monopoly power ordinarily has no duty to deal with a competitor, unless there is no legitimate business purpose for its refusal to deal."); *supra* notes 89–95 and accompanying text.

285 *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (finding a newspaper publisher violates Section Two by refusing to accept advertisements from advertisers who also advertise on competing radio stations).

286 472 U.S. 585 (1985).

287 The defendant controlled three of the four ski locations served by the joint lift ticket. *See id.* at 587–88.

288 If the plaintiff had accepted the reduced percentage of profits, why should this constitute concerted action for Section One purposes, even though defendant had done nothing differently between the two scenarios? There is no logical reason why the latter scenario is more injurious to competition and therefore should be treated more harshly under antitrust laws.

refusal to deal.[289] A tying arrangement announced by a single seller is no different in terms of the defendant's conduct than the unilateral refusal to deal in *Aspen Skiing*: in both cases, a business announces the terms upon which it will deal and those terms are considered onerous by the other party to the negotiation. In tying, a seller imposes an onerous term, namely, "If you want X, you must also buy Y." If the buyer declines to accept the onerous term, she could allege a unilateral refusal to deal, subject to Section Two scrutiny. If the buyer accepts the tie-in, under current law, this transaction becomes concerted action subject to Section One scrutiny.

Allowing consumers to convert contract terms into causes of action at their option creates both perverse incentives and inconsistencies across antitrust law. If current tying law were applied to Section Two unilateral refusals to deal, Section One could swallow a good deal of Section Two in this area because plaintiffs have every incentive to accept a defendant's onerous terms.[290] After all, if the plaintiff declines the defendant's terms, she would have to show that the defendant's conduct maintained or threatened an actual monopoly under Section Two. In contrast, under the logic of unilateral tying arrangement cases, the plaintiff could simply acquiesce to any unreasonable conditions—thereby

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[289] Professor Patterson explains that tie-ins can be characterized as unilateral refusals to deal because:

> [I]f it were alleged that a seller required the purchase of tied product B before it would allow the purchase of tying product A, one could interpret the arrangement as one in which the seller would sell A only to owners of B. However, if the buyer agreed to purchase B in order to obtain A, the arrangement would be a tie.

Mark R. Patterson, *Product Definition, Product Information, and Market Power:* Kodak *in Perspective*, 73 N.C. L. REV. 185, 191 n.29 (1994). In short, a tying arrangement is essentially a business announcing the terms upon which it will deal and unilaterally refusing to do business with anyone who declines to accept these terms. *See also* HOVENKAMP, *supra* note 34, at 200 ("Tying arrangements . . . can also be characterized as vertical agreements not to deal.").

The essential facilities doctrine represents a specific type of unilateral refusal to deal. For example, physicians who claim that a hospital has excluded them by means of a tying arrangement are basically being denied access to an essential facility, namely hospital privileges. *See generally* Scott D. Makar, *The Essential Facilities Doctrine and the Health Care Industry*, 21 FLA. ST. U. L. REV. 913 (1994); Sylvia H. Walbolt, et al., *Problems of Access to Health Facilities and Equipment—New Competition for Limited Resources*, 55 ANTITRUST L.J. 599 (1986). The reason that plaintiffs forego such arguments is that it is easier to prove a tying arrangement under Section One than to prove monopolistic conduct under Section Two.

[290] Not all of Section Two would be swallowed because a flat out refusal to deal, without any offer of onerous terms, would not be subject to plaintiff circumvention because plaintiffs would have no opportunity to accept anticompetitive terms in order to create concerted action.

forming a contract—and then turn around and sue under Section One's significantly lower standard of liability.[291] The plaintiff would not have to show any tendency toward monopoly, but would merely have to show that the de facto refusal to deal on "fair terms" was unreasonable.[292] Thus, treating unilaterally imposed tying arrangements under Section One creates a theoretical fissure in the body of law on unilateral refusals to deal.[293]

2. *Leveraging*

Leveraging, also called monopoly leveraging, represents another example of anticompetitive unilateral conduct. It is well established that a monopolist cannot use its monopoly power in one market "to beget monopoly" in another market.[294] Courts agree that leveraging violates Section Two of the Sherman Act when it creates or threatens a monopoly in a second market.[295] However, the Second Circuit in *Berkey Photo v. Eastman Kodak*[296] took leveraging one step further and held that leveraging violates Section Two if a monopolist uses her monopoly power in one market to gain competitive advantage in another market, even if the leveraging does not threaten monopolization of the second market.[297]

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291 It is not far-fetched to fear that consumers may accept a tie-in and then turn around and sue. *See* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 495 (1969).

Furthermore, because it is more difficult for a plaintiff to prevail under a Section Two unilateral refusal to deal theory, defendants often claim that their concerted action is, in fact, a unilateral refusal to deal. For example, in *Kodak*, Kodak tried to dress its concerted action with parts suppliers in the clothes of a unilateral refusal to deal.

292 *See supra* note 85 and accompanying text.

293 Some commentators have worried that by bringing consistency into this area of antitrust law, "many ties would be removed from antitrust scrutiny, because they could be redefined as sellers' unilateral refusals to deal with particular buyers." Patterson, *supra* note 289, at 191 n.29. While the conduct would be characterized as a unilateral refusal to deal, that does not remove it from antitrust scrutiny, but merely from Section One scrutiny. Rather, the conduct would be evaluated under Section Two of the Sherman Act or Section Three of the Clayton Act. *See infra* Parts V.B & V.C.

294 United States v. Griffith, 334 U.S. 100, 108 (1948). Monopoly leveraging includes a broad category of conduct, including tying arrangements and price squeezes.

295 *See id*; *see generally* Great W. Directories, Inc. v. Southwestern Bell Tel. Co., 63 F.3d 1378 (5th Cir. 1995), *amended by*, 1996-1 Trade Cas. (CCH) ¶ 71,281 (5th Cir. 1996); Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 63 F.3d 1540 (10th Cir. 1995); Key Enter. of Del., Inc. v. Venice Hosp., 919 F.2d 1550 (11th Cir. 1990).

296 603 F.2d 263 (2d Cir. 1979).

297 *See id.* at 275.

While most circuits have declined to enter the fray,[298] others have explicitly rejected *Berkey*.[299] In rejecting leveraging as an independent Section Two violation, the Ninth Circuit in *Alaska Airlines v. United Airlines*,[300] held that leveraging is not illegal unless it creates the risk of monopolization in the downstream market. The court explained:

> The anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in the second market. By definition, the monopolist has failed to gain, or attempt to gain, a monopoly in the second market. Thus, such activity fails to meet the second element necessary to establish a violation of Section 2. Unless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or to attempt to do so, there is no Section 2 violation.[301]

The Ninth Circuit's reasoning is sound and has been implicitly endorsed by the Supreme Court in *Kodak*.[302] Section Two only proscribes actual and

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298 *See Multistate Legal Studies*, 63 F.3d at 1551 n.8; Willman v. Heartland Hosp. E., 34 F.3d 605, 613 (8th Cir. 1994); M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., 981 F.2d 160, 168–69 (4th Cir. 1992).

299 *See* Alaska Airlines v. United Airlines, Inc., 948 F.2d 536, 548–49 (9th Cir. 1991); *see also* Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 206 (3d Cir. 1992) (holding that "in order to prevail upon a theory of monopoly leveraging, a plaintiff must prove threatened or actual monopoly in the leveraged market").

300 948 F.2d at 548–49.

301 *Id.* at 548.

302 504 U.S. 451, 482–83 (1993). The Third Circuit followed *Alaska Airlines* in *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 206 (3d Cir. 1992). Recently, several district courts entering the fray have adopted and propounded the reasoning of the Ninth and Third Circuits. For example, the district court in *Adcom, Inc. v. Nokia Corp.*, 812 F. Supp. 81 (E.D. La. 1993), found that:

> [T]he reasoning in *Fineman* and *Alaska Airlines* is unimpeachable. First, and most importantly, the court believes, as did the Third Circuit, that *Berkey Photo's* leveraging theory "does violence to the text of the Sherman Act and decimates" Congress' purposeful distinction between concerted conduct that "restrains trade" in Sherman § 1 and unilateral conduct that "monopolizes or attempts to monopolize" in Sherman § 2.

Id. at 84 (citations and footnotes omitted); *see also* Advanced Health Care Servs. v. Giles Mem'l Hosp., 846 F. Supp. 488, 497 (W.Va. 1994) (criticizing *Berkey* as destroying the Sherman Act's distinction between unilateral and concerted action by reasoning "when a monopolist has a lawful monopoly in one market and uses its power to gain a competitive advantage in a second market, the anticompetitive dangers that implicate the Sherman Act are not present.") (citations omitted).

attempted monopolization, not any use of monopoly power that may be deemed anticompetitive. The entire structure of the Sherman Act is based on the fact that a single firm can engage in anticompetitive conduct—conduct in which two firms acting together could not engage—so long as it does not create, maintain, or threaten monopolization. As the Supreme Court reiterated in *Spectrum Sports, Inc. v. McQuillan*, "[Section Two] makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[303]

This same rationale applies equally to unilaterally imposed tying arrangements. After all, tying arrangements are just a form of leveraging market power from one market to another.[304] The Ninth Circuit's reasoning and result illustrate the inconsistency in precluding leveraging as an independent theory of recovery under Section Two while condemning unilaterally imposed tying arrangements under Section One. Just as leveraging to gain competitive advantage is not illegal unless it threatens monopoly, unilaterally imposed tying arrangements should not be illegal under the Sherman Act unless they create a dangerous probability of monopolization of the tied product.[305] Unless claims against unilateral tying arrangements are limited to Section Two analysis, there is no principled reason why Section Two leveraging cases should not be considered under Section One whenever any buyer submits to the leverage. In short, treating one form of monopoly leveraging as a Section One violation, while evaluating all other forms of monopoly leveraging—even those that involve contracts—under Section Two creates a significant inconsistency in antitrust law. Pleading a unilateral tying arrangement under Section One is basically an effective mechanism to circumvent the law of monopoly leveraging under Section Two.

3. *Price Squeezes*

Another type of classic unilateral anticompetitive conduct is a price squeeze. When a monopolist controls the market for an input and also competes in the market for the finished product in a downstream market, a price squeeze exists if the monopolist charges a high price for the input and a low price for the final product, such that the business buying the input cannot compete in the

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303 506 U.S. 447, 459 (1993).

304 *See infra* notes 333–35 and accompanying text.

305 Unilaterally imposed tying arrangements may still be condemned under Section Three of the Clayton Act under a lower threshold of liability, namely whether the tying arrangement substantially lessens competition. *See infra* Part V.C. Because Section Three provides a freestanding standard for liability, it can be employed without injury to the Sherman Act's internally consistent delicate balance between unilateral and concerted action. *See supra* notes 2–20 and accompanying text.

downstream market and earn a living profit.[306] The price squeeze is perfected when a consumer pays the monopolist's price for the finished good (and necessarily declines to purchase the good from the monopolist's competitor).

There are at least two contracts involved in any price squeeze: (1) the monopolist contracts to supply the input to the downstream competitor at an impermissibly high price; (2) the monopolist contracts with the consumer to supply the finished product at an impermissibly low price. But neither of these contracts converts a price squeeze into Section One conduct.[307]

A price squeeze is clearly unilateral conduct to be evaluated under Section Two.[308] However, if the current reasoning on unilateral tying arrangements were applied to other unilateral restraints, a price squeeze would fall under Section One after the downstream competitor or consumer agreed to pay the requested price because there are contracts that constitute concerted action and have the (unilateral) intent and effect of diminishing competition. No one argues that price squeezes should be analyzed under Section One, yet such conduct represents the same type of leveraging involved in unilaterally imposed tying arrangements.

4. *Predatory Pricing*

Predatory pricing is also classic Section Two conduct. Predatory pricing exists when a business prices its products "below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."[309] Successful predatory pricing requires consumers

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[306] *See* Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 809 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986); United States v. Aluminum Co. of Am., 148 F.2d 416, 437–38 (2d Cir. 1945) ("Alcoa").

[307] There are many cogent explanations, despite the inherent existence of contracts in any successful price squeeze, for why a price squeeze is analyzed under Section Two, and not Section One. For example, if there is only one wrongdoer, the monopolist, there could only be one defendant because the monopolist's competitor in the downstream market could not sue the consumer who ultimately purchases the product from the monopolist. Similarly, the consumer cannot sue the competitor for buying the input at an inflated price from the monopolist. (Arguably, the consumer is a victim because the monopolist's competitor could be able to sell the finished good at a lower market price if the monopolist would sell the input at a "fair price.") While this may appear to be a reasonable justification for analyzing price squeezes as unilateral conduct despite the presence of contracts, this precise anomaly is present when courts analyze unilaterally imposed tying arrangements under Section One of the Sherman Act. *See supra* notes 192–202 and accompanying text.

[308] *See Alcoa*, 148 F.2d at 437–38; *see also* City of Concord v. Boston Edison Co., 915 F.2d 17, 18 (1st Cir. 1990).

[309] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 (1986). There is currently no consensus among the circuits as to what constitutes the "appropriate measure of cost." *See*

to purchase products from the defendant (because she has priced them below cost) and forego purchases from the defendant's competitors, thereby driving them out of business.

Predatory pricing depends on contracts for success. After all, only when a consumer contracts to pay the predatorily low price does a defendant's competitor suffer antitrust injury from the defendant's conduct.

Applying the current thinking on unilaterally imposed tying arrangements to predatory pricing would remove the protection of Section Two's heightened standards for pricing decisions. Whenever a consumer pays a predatorily low price, there is a contract; but this does not convert predatory pricing into a Section One violation as it would under the doctrine applied to unilateral tying arrangements.[310] Instead, predatory pricing properly remains a Section Two claim.

5. *Other Section Two Conduct*

In addition to these specific examples of Section Two conduct, there are several other contract-based Section Two violations that are not as easily labeled and categorized. For example, one of the keystone cases in Section Two jurisprudence involved the nature of the defendant's contractual relations. In *United Shoe Machinery Corp. v. United States* [*United Shoe III*],[311] the Supreme Court held that the defendant's use of long-term leases of its machinery, as part of an overall anticompetitive plan of operation, constituted a Section Two violation because the long-term leases foreclosed competition.[312] Although this case was treated as unilateral conduct under Section Two, the leases involved in the case were contracts and it is difficult to justify why the contract in a tying case establishes Section One conduct while the contracts in *United Shoe III* did not. In short, if the theory behind current tying law were applied across the antitrust landscape, any Section Two violation that involves a monopolist unilaterally imposing an onerous term into a contract could—properly pled and presented—be converted into a Section One violation.

In sum, America's antitrust regime establishes a wall between unilateral and concerted action, which provides greater latitude for unilateral conduct. Under the school of thought holding that unilaterally imposed tying arrangements are concerted action, every unilaterally imposed trade restraint that is memorialized

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Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341 n.10 (1990).

310 *Cf.* 9 AREEDA, *supra* note 30, at 12 ("[T]he purchase of the second [tied] product is inherently an agreement[.]").

311 347 U.S. 521 (1954).

312 *See generally* Michael Waldman, *Eliminating the Market for Secondhand Goods: An Alternative Explanation for Leasing*, 40 J.L. & ECON. 61 (1997).

in a contract is potentially subject to Section One liability. The ultimate result of such thinking would be a deterioration of the umbrella of protection provided to businesses acting unilaterally.

D. *Exclusive Dealing Arrangements*

In addition to potential Section Two mischaracterizations, plaintiffs may also label exclusive dealing contracts as tying arrangements in order to take advantage of the lower burdens of proof applied to tie-ins. Section Three of the Clayton Act proscribes both tying arrangements and exclusive dealing arrangements. In order for exclusive dealing arrangements to be condemned, a significant percentage of the market must be foreclosed.[313] For example, several courts have held that in order for an exclusive dealing arrangement to be condemned a plaintiff must prove that at least 10% of the market has been foreclosed.[314] In contrast, a tying arrangement can be condemned without showing that any given market share in the tied product market has been foreclosed.[315] Thus, if an exclusive dealing arrangement could be characterized as a tie-in, it could be condemned if less than 1% of the market were foreclosed, as long as a not insubstantial dollar volume of commerce were affected.[316] As a result, it is significantly easier to condemn a tying arrangement than an exclusive dealing arrangement.[317]

What better way to avoid the relatively more difficult test applied to exclusive dealing arrangements than to characterize exclusive dealing arrangements as tying arrangements? The plaintiff has some latitude in characterizing the restraint at issue because "the distinction between a tying arrangement and an exclusive dealing arrangement may be difficult to draw."[318]

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[313] Justice O'Connor noted in her concurrence in *Jefferson Parish* that "[e]xclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring); *see generally* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[314] *See infra* note 393 and accompanying text.

[315] *See supra* notes 215–26 and accompanying text.

[316] *See id.*

[317] *See* 9 AREEDA, *supra* note 30, at 17 ("Tie-ins are treated more harshly even though the primary statute addressing them does not distinguish between tying and exclusive dealing[.]"); KAYSEN & TURNER, *supra* note 261, at 147. It is also more difficult for plaintiffs to prevail under an exclusive-dealing theory because courts are generally more rigorous in defining markets in exclusive dealing cases. *See, e.g.*, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[318] KAYSEN & TURNER, *supra* note 261, at 153.

According to Justice O'Connor's concurrence in *Jefferson Parish*, this is precisely what happened when an exclusive contract between a hospital and an anesthesiology firm was analyzed as a tying arrangement.[319] By treating tying and exclusive dealing under wildly different standards, despite the fact that both are condemned by the same standard in Section Three of the Clayton Act, plaintiffs have a powerful incentive to circumvent the higher standard applied to exclusive dealing arrangements by characterizing conduct as a tie-in.[320] Deciding which outcome-determinative test to apply based on such characterizations undermines both the consistency and legitimacy of antitrust law.

E. *Conceptually, Unilaterally Imposed Tying Arrangements Resemble Section Two Unilateral Conduct*

Conceptually, unilaterally imposed tying arrangements look more like Section Two unilateral conduct than Section One concerted action.[321] The current test for tying under Section One shares the same construction as Section Two tests and includes many elements that reflect Section Two concerns. Taking a step back and looking at unilaterally imposed tying arrangements with fresh eyes, tying (and the legal test for tying) looks more like Section Two conduct than Section One conduct.

1. *Tying Violations Are Element-Driven*

In order to violate Section One of the Sherman Act, a tying arrangement

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[319] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 1, 1 n.2 (1984) (O'Connor, J., concurring); *see also* Richard M. Steuer, *Exclusive Dealing After* Jefferson Parish, 54 ANTITRUST L.J. 1229, 1230–31 (1986).

[320] *Cf.* 9 AREEDA, *supra* note 30, at 14 (showing how "the lure of easy victory under tying doctrines stimulated government and private plaintiffs to view an integrated firm's product as a tie of its components or inputs").

[321] Anecdotal support for the conceptual argument is found in the fact that many antitrust treatises treat tying arrangements as unilateral conduct. *See, e.g.*, MILTON HANDLER ET AL., CASES AND MATERIAL ON TRADE REGULATION (4th ed. 1997) (discussing tying arrangements in the chapter entitled *Additional Limitations on a Single Firm Exercising Market Power*—a chapter that includes predatory pricing, essential facilities, and other Section Two conduct).

Similarly, it is worth noting that the European Union treats tying arrangements as unilateral conduct under its competition law. Although "surprisingly few" tying cases are brought under Article 85, the European analog to Section One, *see* Veltrop, *supra* note 229, at 557, tying arrangements are explicitly proscribed as an abusive practice under Article 86, the European equivalent of Section Two. *Id.* at 568 (citing Article 86(d)); *see also* Andersen, *supra* note 65, at 291–95 (discussing application of Article 86 in tying context).

must satisfy several independent elements.[322] If any of these elements are not present, the defendant's tie-in does not violate Section One. These elements are unique to tying arrangements; no other Section One violation shares any of these elements.

Indeed, no other Section One violation has its own set of elements.[323] For example, price-fixing—whether horizontal or vertical—does not have its own list of elements; courts simply ask whether prices were fixed. In short, the analysis of Section One restraints is not element-driven.

In contrast, many Section Two violations are element-driven, with commonly asserted Section Two claims having their own individual elements that must be satisfied.[324] Similarly, anticompetitive conduct with respect to attempted monopolization often has its own specific elements.[325] By having its own set of elements, tying looks more like a Section Two violation than a Section One violation.

2. *Elements of Tying Claims Reflect Section Two Concepts*

Not only does the current tying cause of action resemble a Section Two violation because it is element-driven, most of the individual elements of a unilaterally imposed tying arrangement, especially those that are foreign to Section One case law, make more sense in the context of Section Two.

a. *Requiring Two Products*

Current tying law requires that the seller tie two separate products together. The requirement makes sense because the core issue is leveraging market power from one market into another separate market. However, leveraging is an inherently Section Two concept.[326] While no other Section One violation is based on unilateral leveraging across markets, many Section Two violations are.[327]

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[322] *See supra* note 85.

[323] *See supra* note 86 and accompanying text.

[324] *See, e.g.*, City of Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1377–79 (9th Cir. 1992) (discussing the elements of a Section Two price squeeze); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (listing elements for Section Two denial of access to essential facilities).

[325] *See, e.g.*, Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223–26 (1993) (discussing predatory pricing elements).

[326] *See supra* notes 294–305 and accompanying text.

[327] *See, e.g.*, *City of Anaheim*, 955 F.2d at 1377–79 (discussing price squeeze theory).

b. *Requiring Conditioning*

Section One tying law requires that the seller condition her sale of one product on the buyer purchasing another product. The condition is set unilaterally. The conduct of only one party to the agreement is subject to liability. This is common in most Section Two litigation but is anathema to Section One jurisprudence.[328]

c. *Requiring Sufficient Economic Power*

Section One tying law requires that the seller have sufficient economic power to coerce a tie-in. But as argued above, this power to force a tie-in is, in fact, monopoly power, which is a fundamental Section Two construct.[329] Even when courts examine market power in a Section One Rule of Reason analysis, no other Section One violation involves or requires de facto monopoly power.

d. *Requiring Coercion/Forcing*

Related to the economic power requirement is the coercion requirement;[330] current tying law under Section One requires coercion. While the coercion requirement is anomalous under Section One,[331] it is consistent with Section Two jurisprudence. Economic coercion is a common Section Two concept.[332]

Finally, the remaining aspects of tying law that create anomalies under Section One are completely congruent with Section Two jurisprudence. For example, the major anomaly of current tying law—that there is only one defendant—is perfectly consistent with Section Two violations, most of which have but one corporate defendant. The remaining anomaly that the victim must participate in order to have a cause of action for Section One tying does not apply to Section Two jurisprudence because Section Two does not require any contract or agreement; thus, the anticompetitive conditioning alone can form the basis of Section Two liability.

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[328] *See supra* notes 195–202 and accompanying text.

[329] *See supra* notes 269–74 and accompanying text.

[330] This is similar to the conditioning element, but they each highlight separate, albeit related, concerns. The conditioning element shows that only one decisionmaker is imposing the restraint and therefore only one defendant is on the line. The coercion element takes this one step further and notes that not only is the restraint unilaterally imposed, but it represents the type of conduct that traditionally belongs in Section Two.

[331] *See supra* notes 203–10 and accompanying text.

[332] *See, e.g., In re* Insurance Antitrust Litig., 938 F.2d 919, 930 (9th Cir. 1991); Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 648 (9th Cir. 1981).

F. *Treating Unilaterally Imposed Tying Arrangements as Unilateral Conduct Provides a Reasonable Middle Ground for Competing Economic Theories*

Analyzing unilaterally imposed tying arrangements as unilateral conduct is more consistent with economic and leverage theory. Tying arrangements represent a form of leveraging.[333] Tying arrangements were originally condemned because a monopolist is prohibited from using her monopoly power over one product to achieve or secure a monopoly over another product. The current test for evaluating unilateral tying arrangements under Section One is still based on the notion that a seller with sufficient market power in the tying product can leverage that power to decrease competition in the tied product market.[334] Early doctrine asserted that there were no countervailing justifications for tie-ins because courts assumed that tying existed solely to leverage market power. For example, early Supreme Court case law was based on the premise that "[t]ying agreements serve hardly any purpose beyond the suppression of competition."[335]

However, the Chicago School has challenged this line of thinking, arguing that leveraging is impossible or irrelevant because a monopolist possesses a finite amount of monopoly power. Chicagoans argue that leveraging only redistributes the monopoly profits possible in one market across two markets. For example, Robert Bork asserts that "there is no viable theory of a means by which tying arrangements injure competition[.]"[336] A unilaterally imposed tying arrangement cannot, under this view, decrease consumer welfare any more than simply charging the monopoly price for the tying product.[337] This is so because the seller must decrease the price charged for the tying product in order to induce consumers to accept the tie-in. In other words, in a world of one product, monopolists exercise their market power by raising the price; in a world of

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[333] *See* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 614–15 (1953); Kaplow, *supra* note 248, at 515 (stating that a tying arrangements represents the "most common application of the leverage hypothesis"). It is instructive to think of tying arrangements as leveraging because leveraging is a Section Two concept. This discussion applies only to unilaterally imposed tying arrangements because concerted tying arrangements are not merely a form of leveraging, but of collusion.

[334] *See supra* notes 25–27 and accompanying text.

[335] Standard Oil Co. v. United States, 337 U.S. 293, 305–06 (1949).

[336] BORK, *supra* note 28, at 372.

[337] *See* Meese, *supra* note 262, at 137–38 ("It is axiomatic that firms cannot exercise market power twice. A firm that possesses market power over the tying product cannot *both* charge a monopoly price for the product *and* use its power to 'force' a customer to take the tied product as well.") (emphasis in original).

multiple markets, the seller may forego some monopoly profits and impose a tie-in. In theory, both schemes decrease consumer welfare by the same amount.

After reigning as the dominant theory in the 1980s, the Chicago School view of tying arrangements has subsequently been attacked by theorists who have presented scenarios where tying arrangements can be used by a monopolist to secure additional monopolies at the expense of consumer welfare.[338] For example, leveraging from a traditional market to a market for a standardized product can increase a business's profits by securing a monopoly position in the standardized market that has relatively high barriers to entry.[339] Similarly, a monopolist can extract greater consumer surplus by employing a tying arrangement as a mechanism to obscure true prices and trick the consumer into paying more than he would pay in a truly competitive market with accurate information. By obscuring the actual price, the tie-in both creates and exploits a market failure.[340]

Both schools of thought have merit. Traditionalists explain how tying arrangements can be used to leverage market power across markets. The Chicago School stresses the general benignity of tying arrangements and argues that the seller cannot increase her net gains through tying. In response to the Chicago School, scholars have posited situations in which tying arrangements can expand a seller's market power and, consequently, decrease consumer welfare.

Evaluating unilaterally imposed tying arrangements under Section Two harnesses the wisdom of both schools. The Chicago School informs us that tying arrangements are not menacing in general because the market acts as a check. Thus, in the absence of certain market failures, a tying arrangement does not present a dangerous probability of monopolizing the market for the tied product. However, when market failures (whether or not created by the seller) make tying a viable mechanism to expand monopoly power and reduce consumer welfare, antitrust law should provide a check on the monopolist's conduct. Analyzing unilaterally imposed tying arrangements under Section Two of the Sherman Act or Section Three of the Clayton Act strikes the proper balance because tying arrangements are not proscribed unless they actually threaten monopoly (under Section Two) or substantially lessen competition (under Section Three) in a second market. This allows business room to maneuver but not to monopolize or

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[338] *See* Kaplow, *supra* note 248, at 525–26 (arguing that leveraging can decrease consumer welfare, due to market failures); *see generally* Roger D. Blair & Amanda K. Esquibel, *Some Remarks on Monopoly Leveraging*, 40 ANTITRUST BULL. 371 (1995) (leveraging can impose consumer loss, even if monopoly not achieved).

[339] *See* Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041, 1077 (1996).

[340] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461–63 (1992).

otherwise injure competition.

V. MAKING TYING LAW DOCTRINALLY CONSISTENT WITH ANTITRUST LAW OVERALL

Although some of the preceding argument invoked legislative history and economic theory, it is primarily a doctrinal argument. Evaluating unilaterally imposed tying arrangements under Section One of the Sherman Act creates significant inconsistencies across antitrust caselaw. These doctrinal inconsistencies would be eliminated if unilaterally imposed tying arrangements were treated as unilateral conduct and evaluated under Section Two of the Sherman Act or Section Three of the Clayton Act. This Part briefly notes the importance of doctrinal consistency in antitrust law. It then explains why from a practical standpoint, it is appropriate to refuse to treat unilaterally imposed tying arrangements as concerted action. After discussing the legitimacy of protecting certain tie-ins by nonmonopolists, this Part argues that doctrinal consistency can be efficiently achieved by analyzing unilateral tying arrangements under Section Two of the Sherman Act or Section Three of the Clayton Act. In short, evaluating unilaterally imposed tying arrangements under the higher standards of Section Two of the Sherman Act or Section Three of the Clayton Act will lead to more appropriate outcomes, proscribing only those tie-ins that threaten competition, while still preserving doctrinal consistency.

A. *The Value of Doctrinal Consistency and Correct Doctrine*

Making antitrust doctrine consistent by evaluating unilaterally imposed tying arrangements as unilateral conduct is important for several reasons. First, doctrinal consistency is necessary in business law. Antitrust law defines some of the basic rules for business conduct. The goal of antitrust law is not to regulate the marketplace so much as to define the outer boundaries of legal competition. These boundaries need to be clearly defined so that business may compete vigorously, as antitrust law intends, without fear of liability.[341] Otherwise, the risk of antitrust liability could chill zealous competition.[342]

Second, as a matter of economic theory and practice, unilateral business behavior should not be subject to antitrust penalties unless it threatens monopolization; yet current tying law proscribes unilateral tying arrangements that are either benign or beneficial to competition. In an effort to encourage vigorous competition, antitrust courts have consistently defined these boundaries

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[341] *See* 10 AREEDA ET AL., *supra* note 194, at 284–85.

[342] *See supra* notes 97–98 and accompanying text.

to include a safe harbor for most unilateral conduct by a nonmonopolist.[343] Thus, only those forms of unilateral conduct that threaten actual monopolization violate antitrust laws.[344] Defining the safe harbor in this manner insures that nonmonopolists can engage in aggressive unilateral conduct—even if it is considered anticompetitive—without worrying about the risk of antitrust liability.[345] This maximizes zealous competition, which the 1890 Congress and over a century of federal court decisions have reasoned will produce the greatest number of goods at the lowest prices.

Many unilateral tying arrangements are simply part of the rough and tumble of the competitive marketplace[346]—and that market acts as a control. Thus, while businesses are free to increase price from a legal or regulatory standpoint, the existence of other competing businesses prevents any one seller from charging supra-competitive prices. Only when the market check mechanism breaks down—such as when there is collusion between competitors or when one business illegally obtains a monopoly—does antitrust law step in to constrain business decisionmaking. Although one articulated purpose of antitrust law is to maintain lower prices for consumers, barring unusual circumstances, antitrust law protects the right of a business to unilaterally raise prices. Antitrust does not regulate price directly because it is founded on the philosophy that a free market can best determine the optimal price. The same market principles that regulate price fluctuations should prevent abuse of tying arrangements.

To the extent that a tying arrangement is simply a package of goods offered for sale, the best way to insure that the packages offered to consumers are those that they most prefer is to rely on the market mechanism. This can be seen on several levels. First, the market mechanism can better distinguish between anticompetitive and beneficial tie-ins. Some unilaterally imposed tying arrangements benefit consumers. For example, consumers often desire promotional tie-ins that offer an attractive bundle of products at a good price.[347]

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[343] *See supra* note 89–95 and accompanying text (discussing the Colgate Doctrine).

[344] *See supra* note 20 and accompanying text.

[345] *See* Fisher v. City of Berkeley, 475 U.S. 260, 266 (1986) (stating that even where the effect is the same as concerted action, there is no Section One antitrust liability unless there is concerted action).

[346] The American economy and psyche are founded on the principle of free markets. Overregulation of tying arrangements is at odds with America's laissez-faire philosophy. As a society, we eschew price controls, despite the fact that this means that business is free to increase, as well as decrease, prices at will. Of course, there are exceptions in extreme situations such as wartime price controls and prohibitions on price gouging in emergencies.

[347] *See* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 518 (1969) (White, J., dissenting). In *Fortner I*, it was the consumer who demanded the tie-in. *See* BORK, *supra* note 28, at 369; *see also* Blair & Finci, *supra* note 277, at 561–62.

Tying arrangements—including those that affect a not insubstantial amount of commerce in the tied product—can sometimes facilitate better packages for consumers.[348]

More importantly, from an antitrust perspective, tying arrangements often facilitate competition and indeed are a form of competition. As Justice White explained in his *Fortner I* dissent:

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[348] For example, many consumers know the frustration of buying a product that requires batteries only to discover that "batteries are not included." A large segment of consumers would prefer that batteries be included in such products. This would represent a situation in which the products are not merely shrink wrapped, but the tied product is included in the box of the tying product. Some consumers may not even realize that they are buying the tied product, although many will be happy that they did.

In response to consumer frustration, some manufacturers now include batteries in their products. So long as the price of the tying product includes some of the cost of the tied product (in this case, the battery), then some federal courts would hold that there is in fact a tying arrangement between the tying product and the battery. *See* Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 63 F.3d 1540, 1548 (10th Cir. 1995), *cert. denied*, 514 U.S. 1044 (1996) ("Where the price of a bundled product reflects any of the cost of the tied product, customers are purchasing the tied product, even if it is touted as being free."); *see also* 9 AREEDA, *supra* note 30, at 217–19. Conversely, if the manufacturer gives away batteries without recovering its costs, it can be accused of engaging in predatory pricing. *See supra* note 309–10 and accompanying text (discussing predatory pricing).

Despite the attractiveness of including batteries in certain products, batteries constitute a separate product. Separateness of tying purposes is a function of consumer demand. If consumers have independent demand for the two products, then they constitute two separate products for tying purposes. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 19 (1984). Consumers currently have separate demand for batteries; there is a thriving multi-million dollar market for batteries. The fact that batteries are necessary to run the product does not mean that batteries are not a separate product. *Cf.* Jerrold Elecs. Corp. v. United States, 365 U.S. 567 (1961) (per curiam). So long as the manufacturer of the tying product has "market power" in the specific product—be it a hand-held game, a tape player, a pager—being sold, then the inclusion of batteries could constitute an illegal tying arrangement so long as a not insubstantial dollar volume of batteries is affected. This is true even if many targeted consumers find the package to be an attractive one. This is precisely the type of package that a free market should provide and upon which antitrust law should not intrude

Although this footnote is not intended to be a comprehensive exegesis on battery tie-ins, it is worth noting that one reason why including batteries may not present a tying problem is because some courts require that the defendant have an economic interest in the tied product. *See, e.g.*, White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104 (4th Cir. 1987). This may provide a defense for those manufacturers that do not have an economic interest in batteries. However, some manufacturers may receive a marginal profit from the batteries, satisfying this requirement. Furthermore, some manufacturers of consumer goods do in fact manufacture batteries, as well as the products in which they are used. For example, Kodak manufactures batteries (and is not a stranger to antitrust problems in general or tying in particular).

> Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms—where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise—the seller in effect is merely competing in the tied product market.[349]

Indeed, some tying arrangements may introduce competition into a tied product market that would otherwise be monopolized. Thus, Professor Areeda concluded that "many actual ties—especially when tie-ins are broadly defined—can reflect pro-competitive price competition without any prospect of real detriments."[350]

Current tying law ignores the role of the market as a control mechanism and assumes that consumers never desire tie-ins but rather are "forced" or "coerced" to buy the tied product against their will.[351] However, despite the language of coercion in tying cases, absent extreme circumstances, consumers are rarely truly "forced" to purchase a tied product.[352] Consumers buying a tying product are not forced suddenly to purchase the tied product without any inquiry into its costs or merits.[353] Rather, consumers examine the entire package of the tied and tying product, as the Supreme Court has acknowledged.[354] If a

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349 *Fortner I*, 394 U.S. at 518 (White, J., dissenting); *see also* Standard Oil Co. v. United States, 337 U.S. 293, 323 (1949) (Jackson, J., dissenting) (stating that requirements contracts may very well be devices for waging, rather than suppressing, competition).

350 9 AREEDA, *supra* note 30, at 183; *see also id.* at 28 ("[M]ost litigated arrangements that could be described as ties are either neutral in their competitive implications or even pro-competitive[.]").

351 *Cf.* Standard Oil Co. v. United States, 337 U.S. 293, 313–14 (1949).

352 True forcing could only exist if the consumer were also forced to take the tying product. This could mean duress (as applied in contract law) or a tying product with a relatively inelastic demand, such as insulin. If the only insulin seller in a geographic market tied insulin to syringes, then diabetics would—given these facts—be forced to purchase syringes from that supplier. But such an extreme case is rarely found among the hundreds of reported tying cases. *See e.g.*, Mark A. Hurwitz, *Bundling Patented Drugs and Medical Services: An Antitrust Analysis*, 91 COLUM. L. REV. 1188 (1991) (discussing the use of the schizophrenia drug clozapine as a tying product).

353 *Cf.* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 605 (1953) ("By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market.").

354 *See* United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 618 (1977); Brinson, *supra* note 241, at 37 ("A buyer faced with a seller's tying arrangement will simply weigh his desire for the tying product against the price of the tying and tied products."); Note, *The Logic of Foreclosure: Tie-In Doctrine after* Fortner v. U.S. Steel, 79 YALE. L.J. 86, 91 (1969).

tie-in is onerous, the consumer can forego the purchase; she can decline to purchase the tying product at all or she can purchase it separately from another supplier.[355] Even if tying arrangements abound in certain markets, there can still be competition among bundled packages.[356]

Not all tying arrangements are the result of coercion.[357] Current tying law fails to recognize that tying arrangements are sometimes valued by consumers and can be harmless to competition or actually promote it. This failure is embodied in the judicial presumption that if a tying arrangement affects a high number of buyers, then there is coercion.[358] But this misses the point that ubiquity is as much a signal of consumer demand as it is of seller coercion.[359]

> Whatever the buyer regards as burdens of the tie-in, whether low quality of the tied good, inability to deal with preferred tied good sellers, or the risk inherent in being restricted to a given purchase in advance, these burdens should be fully reflected in a decrease in what the buyer will pay for the package.

Id.

[355] The only reason that this would not be possible is if the supplier enjoyed a monopoly over the tying product. *See supra* notes 235–80 and accompanying text. In such a situation, antitrust law should forbid the tie-in if it substantially lessens competition in the market for the tied product. *See infra* Part V.C.

[356] *See* United States v. Loew's, Inc., 371 U.S. 38, 40–41 (1962).

[357] *See* Meese, *supra* note 249, at 99 ("Because ties can arise without any exercise of market power, the mere presence of a tie, even when coupled with the existence of market power, does not logically give rise to a presumption that forcing is present[.]").

[358] *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 7–8 (1958) ("The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power[.]"). Some courts are prone to assert that offering an attractive product or package is evidence of coercion. Some unfortunate language in *Fortner II* invited courts to assume market power from the mere existence of a tie-in by interpreting its prior decisions as "focus[ing] attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." 429 U.S. at 620. To the extent that subsequent courts have treated the tie-in itself as a "burdensome term," the existence of the tie-in becomes proof of the seller's economic power to impose it. But the *Fortner II* court explicitly rejected such a conflation except in "the absence of other explanations for the willingness of buyers to purchase the package" of tying and tied products. *Id.* at 618 n.10; *cf.* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 518 (1969) (White, J., dissenting) ("But I question that buyers' acceptance of the tie-in—the simple fact that there are customers—will always suffice to prove market power in the tying product.").

[359] *See* Ungar v. Dunkin' Donuts of Am., Inc., 531 F.2d 1211, 1225 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976) ("Obviously, if the question is whether there is a 'tie,' proof that large numbers of buyers accepted a burdensome or uneconomic 'tie' is not helpful. The 'proof' assumes the answer rather than proving it."); Veltrop, *supra* note 229, at 553. Veltrop states:

Current law conflates a product's desirability with coercion.[360] This result is inconsistent with the underlying theory of antitrust in that encouraging sellers to offer product packages that sell well is the essence of competition. If a nonmonopolist constructs a desirable package of bundled goods, then high sales show that she has read the market correctly. High sales are as much evidence that the market is working as they are that the market is broken.

Furthermore, this conflation of ubiquity and coercion also distorts a supplier's incentives to respond to perceived consumer demand.[361] After all, if offering an attractive bundle of products that consumers decide to purchase constitutes coercion, then sellers have decreased incentives to compete by offering attractive packages and subjecting themselves to antitrust liability.[362] Antitrust is not supposed to quell such forms of competition.[363] Nowhere else in

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> [M]ost products purchased by consumers are divisible into several components, e.g. an automobile usually comes with tyres, seats and a windscreen, and products are often packaged together because of distribution efficiencies and consumer preferences. Where package discounting occurs, moreover, it is difficult to determine whether a buyer has been coerced or has simply struck an advantageous bargain.

Id.; *see also* Meese, *supra* note 249, at 67 ("[T]he presence of a tie is equally consistent with the hypothesis that the agreement is purely voluntary contractual integration[.]").

360 For example, the Court in *Loew's* held that "the crucial economic power [to impose a tie-in] may be inferred from the tying product's desirability to consumers[.]" *Loew's*, 371 U.S. at 45.

361 At first blush, it seems odd that a business (with some level of market power over Product X) can market Product X with a campaign of "Buy one X, get another X free," but cannot market Product X with a marketing strategy of "Buy one X, get one Y free." The former scheme would not constitute a tying arrangement because there are not two separate products. The latter marketing plan would constitute a tying arrangement because there are two separate products, X and Y. *See* Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 63 F.3d 1540, 1546–48 (10th Cir. 1995), *cert. denied*, 514 U.S. 1044 (1996). This is so even if X and Y cost the same when sold separately or if most consumers would never want more than one X but would like a Y to go with their X. In other words, current tying law does not inquire into consumer utility or consumer demand beyond merely defining whether two products are "separate" for antitrust purposes.

362 *Cf.* Northern v. McGraw-Edison Co., 542 F.2d 1336, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) (suggesting that there is no defense based on consumer convenience).

363 *See* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 583 (1925).

> It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business....

antitrust do we impose additional burdens on a nonmonopolist simply because she sells a desirable product or package. If competition is not substantially lessened, courts should not punish sellers for offering a popular bundle of goods. As Justice Jackson observed in his dissent in *Standard Oil*, "[i]f the courts are to apply the lash of the antitrust laws to the backs of businessmen to make them compete, we cannot in fairness also apply the lash whenever they hit upon a successful method of competing."[364]

Many tying arrangements are desired by consumers, as suggested by the fact that tying arrangements are common throughout the American economy.[365] Most of these tying arrangements have no effect on competition.[366] For example, a tying arrangement is imposed whenever a fast food restaurant offers a "meal deal" where one food item is given free with purchase of a combination meal.[367] Strict enforcement of current tying law against all such tying arrangements that are routine and affect a "not insubstantial" dollar volume of commerce would prohibit such "meal deals". Writing in a non-tying context, Professor Elhauge has observed, "unilateral exercises of modest market power (for example, pricing by the corner convenience store) are so ubiquitous that subjecting them to plenary antitrust scrutiny would impose excessive litigation costs and deter much desirable conduct."[368] That tying law is not so enforced is of little solace; business planning and marketing must have greater certainty than merely relying on the kindness (or passivity or ignorance) of consumers and prosecutors.[369]

Id.; *see also* United States v. Parker-Rust-Proof Co., 61 F. Supp. 805, 812 (E.D. Mich. 1945) ("The Anti-Trust Laws were not enacted for the purpose of forcing every type of business enterprise into a common mold[.]") (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911)).

364 Standard Oil Co. v. United States, 337 U.S. 293, 324 (1949) (Jackson, J., dissenting).

365 *See* 9 AREEDA, *supra* note 30, at 27 ("tie-ins are omnipresent when broadly defined... [and] cannot all be condemned without disrupting ordinary and useful arrangements that threaten no harm."); *see also* Hamilton, *supra* note 241, at 609 (illustrating that bundling is common between computer software and maintenance services); Meese, *supra* note 249, at 1 (describing tying arrangements as "endemic in the modern economy").

366 *See* 9 AREEDA, *supra* note 30, at 104 ("[M]ost litigated tie-ins have involved a very small foreclosure that... lacked any potential to affect the structure or competitiveness of the tied market[.]").

367 *See* Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 63 F.3d 1540, 1546–47 (10th Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996).

368 Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 735 n.314 (1991) (citing 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 813, at 301, ¶ 833d, at 342 (1978)).

369 *See* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 623 (1953) ("Doubtless, long-tolerated trade arrangements acquire no vested immunity under the Sherman

More to the point, the popularity of certain tie-ins illustrate that such bundling is often—rightly or wrongly—valued by consumers. Thus, by inferring market power from the mere existence of such a tie-in and then proscribing tie-ins that affect a not insubstantial volume of commerce, current tying law outlaws bundling that consumers desire. While admittedly it is difficult to distinguish harmful tying arrangements from beneficial ones,[370] that does not justify imposing a de facto presumption that all tying arrangements are harmful products of coercion.

In sum, antitrust doctrine needs to be consistent, but it also needs to be correct. The current law governing tying arrangements is based on the false assumption that all tying arrangements are the result of coercion and, consequently, should be proscribed. This thinking fails to acknowledge that many tie-ins are desired by consumers and are beneficial to competition. The result is that—because the legal test for condemning tying arrangements under Section One is so low—beneficial or benign tie-ins are punished. This causes long-term detriment to competition.

B. *Achieving Doctrinal Consistency Through Section Two of the Sherman Act*

Treating unilaterally imposed tying arrangements as concerted action creates significant doctrinal inconsistencies across antitrust law.[371] One way of eliminating these inconsistencies is by evaluating unilaterally imposed tying arrangements under Section Two of the Sherman Act.[372] Section Two is intended and structured to regulate unilateral restraints. The anomalies created by evaluating unilaterally imposed tying arrangements under Section One disappear when Section Two is used in its stead.[373]

However, evaluating unilaterally imposed tying arrangements under Section

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Act[.]").

[370] *See* Meese, *supra* note 249, at 45.

[371] *See supra* notes 189–210 and accompanying text.

[372] *See* Posner, *supra* note 28, at 182.

> [E]ven if there were no separate prohibition of tie-ins, the general prohibitions of monopolistic behavior in sections 1 and 2 of the Sherman Act would remain available to deal with cases where a firm had imposed a tie-in with the purpose or likely effect of monopolizing the market for the tied product.

Id.; *see also* Homick, *supra* note 216, at 720 ("[E]xploit[ing] consumers in the market for the tying product may be regulated adequately under Section Two of the Sherman Act.").

[373] *See supra* notes 211–13 and accompanying text.

Two will necessarily alter the results of some tying cases.[374] In contrast to Section One's "not insubstantial" volume test, in order to violate Section Two, a tying arrangement must create a dangerous probability of monopolization of the tied product. The latter is clearly a more rigorous test. For example, while the loss of a single sale of $100,000 in goods may satisfy Section One,[375] such an amount would probably not satisfy Section Two. In short, those currently proscribed unilateral tying arrangements that affect a mere "not insubstantial" dollar amount of commerce in the tied product but that do not threaten actual monopolization of a tied product would not constitute an illegal tying arrangement under Section Two. For this universe of cases, currently proscribed tying arrangements will become permitted under Section Two. This is the cost of consistency, of shoring up the safe harbor for unilateral conduct by a nonmonopolist.

This raises the question of whether changing the ultimate results of cases involving unilateral tying arrangements is desirable.[376] The altered outcome in most cases is absolutely appropriate.[377] Unilateral conduct that affects merely a not insubstantial dollar volume of commerce should not invite antitrust liability, let alone treble damages.[378] The fundamental purpose of antitrust law is to preserve competition. Trade restraints are prohibited because of their effect on competition.[379] Yet after *Jefferson Parish*, the so-called per se rule against tying

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374 Before examining the potential for and desirability of different results of unilaterally imposed tying arrangements, it bears noting that there should be little, if any, change in the result of cases involving concerted tying arrangements, although the reasoning to arrive at that result will resemble traditional Section One analysis.

375 *See supra* note 220 and accompanying text.

376 Of course, how we phrase the question can drive the answer. Phrasing the question, "Should businesses be able to impose tying arrangements so long as the tied product market is not monopolized?" may invite the answer that the law should not allow such tying arrangements. However, if we ask the question in terms of whether we want American business to make independent business decisions—such as product packaging and marketing decisions—free from government price controls, then the invited answer may change.

377 *See supra* notes 341–60 and accompanying text.

378 Independent but related to the argument that evaluating unilaterally imposed tying arrangements under Section One undermines the intent of the Clayton Act, the not insubstantial volume test is also inconsistent with Section Two of the Sherman Act. Whereas the Supreme Court has held that unilateral conduct does not violate Section Two unless it creates an actual monopoly or threatens to do so, prohibiting unilaterally imposed tying arrangements that merely affect a not insubstantial volume of commerce makes the conduct of a single firm unlawful without inquiry into whether it actually monopolizes a market or threatens to do so.

379 Not all courts invoke a requirement that the plaintiff prove an anticompetitive effect in the tied product market. One explanation may be that such a requirement is only necessary under Rule of Reason analysis. *See* Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d

arrangements permits inquiry into all aspects of the trade restraint except the effect on competition, which is simply assumed as a matter of law.[380] Evaluating unilaterally imposed tying arrangements under Section Two insures that there is an actual effect on competition before the unilateral restraint is condemned under the Sherman Act.[381]

However, if all unilaterally imposed tying arrangements were subject to only Section Two liability, many anticompetitive tie-ins would escape liability.[382]

792, 799 (1st Cir. 1988); Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 721 (7th Cir. 1987); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

Similarly, some courts have held that when there is no competition in the sale of the tied product, there is no illegal tying arrangement. *See* Boddicker v. Arizona State Dental Ass'n, 680 F.2d 66, 67 (9th Cir. 1982), *cert. denied*, 459 U.S. 837 (1982); Community Builders v. City of Phoenix, 652 F.2d 823, 830 (9th Cir. 1981) (stating that because state law already precluded competition in the tied product market, tying agreement could have no effect on competition); Driskill v. Dallas Cowboys Football Club, 498 F.2d 321, 323 (5th Cir. 1974); Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1291–92 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1022 (1974); Friedman v. Adams Russell Cable Servs., 624 F. Supp. 1195, 1196 (S.D.N.Y. 1986) (noting that tying is not unlawful when the defendant possesses lawful monopolies in both the tying and tied product).

Most courts only require some competitive effect in the market for the tied product. *See* Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 815 n.11 (1st Cir. 1988), *cert. denied*, 488 U.S. 955 (1988); Hand v. Central Transp., Inc., 779 F.2d 8 (6th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1503, *cert. denied*, 475 U.S. 1107 (1986).

However, some courts have held that the plaintiff must prove "a substantial danger that the tying seller will acquire market power in the tied product market." Carl Sandburg Village Condominium Ass'n v. First Condominium Dev. Co., 758 F.2d 203, 210 (7th Cir. 1985); *see also* Will v. Comprehensive Accounting Corp., 776 F.2d 665, 674 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); Ohio-Sealy Mattress Mfr. Co. v. Sealy, Inc., 585 F.2d 821, 834 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); Smith Mach. Co. v. Hester Corp., 1987-1 Trade Cas. (CCH) ¶67,563, at 60,383–84. This would indicate that a tying arrangement is in fact quite similar to attempted monopolization.

380 *See* Phillip Areeda, *Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 587 (1986) ("The only inquiry that the Jefferson Parish per se rule excludes is proof of the fact or likelihood of adverse effects.... At the moment, adverse effects do not have to be proved, but every other element has to be proved.").

381 Evaluating unilaterally imposed tying arrangements under Section Two comes closer to preserving the Clayton Act's requirement that a tying arrangement substantially lessen competition or tend toward monopoly in order to violate antitrust law. *See supra* notes 374–77 and accompanying text. Section Two is still necessary because Section Three cannot reach certain tying arrangements, such as those involving services.

382 This risk is inherent in the Sherman Act's dichotomy between unilateral and concerted action. *See supra* note 20 and accompanying text. *See also* 1 SECTION OF ANTITRUST LAW, ABA, ANTITRUST LAW DEVELOPMENTS 301 (4th ed. 1997).

While moving such tying arrangements from Section One to Section Two would insure doctrinal consistency, the cost in terms of the practical effects in many cases could be high. Because Section Two requires a dangerous risk of actual monopolization, many anticompetitive tying arrangements would not be condemned until after the defendant had done significant damage to the competitive marketplace, perhaps driving many competitors permanently from the market. Indeed, the Clayton Act reflects the congressional belief that tying arrangements were particularly dangerous and, thus, should be singled out for special treatment and not merely treated like other forms of unilateral restraint under Section Two.[383]

In short, independent of the doctrinal arguments (which clearly support evaluating unilaterally imposed tying arrangements under Section Two), the liability threshold under Section One is arguably too low and the corresponding threshold under Section Two is arguably too high. However, there is another weapon against tying arrangements that, while maintaining doctrinal consistency, provides an intermediate threshold for antitrust liability.

C. *Restoring Doctrinal Consistency by Evaluating Unilaterally Imposed Tying Arrangements Under Section Three of the Clayton Act*

The best alternative to using Section Two of the Sherman Act to reach unilaterally imposed tying arrangements is to employ the one federal law specifically enacted to regulate tying arrangements: Section Three of the Clayton Act. Such an approach has several advantages. First, using Section Three preserves doctrinal consistency. Unlike Section One of the Sherman Act, Section Three of the Clayton Act clearly reaches tying arrangements that are unilaterally imposed by a single seller because the Clayton Act prohibits any one person from making a sale on the condition that the purchaser accept a tie-in.[384] This is demonstrated by both the text of the statute and the legislative debates. Certainly analyzing unilaterally imposed tying arrangements under the Clayton Act does nothing to muddle the unilateral-concerted dichotomy of the Sherman Act. Thus,

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> One implication of the dangerous probability of success requirement is that it prevents Section 2 from reaching unilateral conduct by a small firm that is unlikely to achieve actual monopoly. If the objectionable conduct is unilateral, and thus beyond the reach of Section 1, it may not be prohibited by the Sherman Act regardless of how egregious it is.

Id.

383 *See* Advance Bus. Sys. & Supply Co. v. SCM Corp., 415 F.2d 55, 62 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

384 *See* 15 U.S.C. § 14 (1994).

unilateral tying arrangements can be proscribed under Section Three without impairing antitrust doctrinal consistency or legislative intent.

Second, evaluating unilateral tying arrangements under Section Three provides an appropriate middle ground between Section One's low threshold for liability and Section Two's high threshold. Section One imposes too low a threshold of liability for tying arrangements; unilaterally imposed tying arrangements violate Section One even if they have no effect on the competitive process, so long as a not insubstantial dollar volume of commerce in the tied market is affected.[385] This overreaching standard inflicts liability on beneficial tie-ins that do not harm competition.[386]

Section Three imposes a higher (and more appropriate) threshold for liability than Section One.[387] Section Three proscribes only those tie-ins that "substantially lessen competition or tend to create a monopoly."[388] The Supreme Court has defined the phrase "substantially lessen competition"—as used in Section Three of the Clayton Act—in adjudicating cases of exclusive dealing arrangements (also called "requirements contracts"). In *Tampa Electric Co. v. Nashville Coal Co.*,[389] the Court held that Section Three's "substantially lessen competition" standard is evaluated in the currency of market share, not dollar volume:

> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the *proportionate volume of commerce involved in relation to the total volume of commerce* in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that *a mere showing that the contract itself involved a substantial number of dollars is ordinarily of little consequence.*[390]

Thus, in order to show that a requirements contract or exclusive dealing

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[385] *See supra* notes 215–20 and accompanying text.

[386] *See supra* notes 347–50 and accompanying text.

[387] Many courts and scholars argue that these standards are the same. *See, e.g.*, Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988) (holding that the test for tying is the same "regardless of whether a plaintiff charges a violation of Sherman Act Section 1 or Clayton Act Section 3"); 9 AREEDA, *supra* note 30, at 257 n.23. This Part argues that the standard articulated in the text of Section Three is more demanding than the common law test applied by courts to Section One.

[388] 15 U.S.C. § 14 (1994).

[389] 365 U.S. 320 (1961).

[390] *Id.* at 329 (emphasis added); *see also* Standard Oil Co. v. United States, 337 U.S. 293, 322 (1949) (Jackson, J., dissenting).

arrangement "substantially lessen[ed] competition," a plaintiff must show that market share was substantially affected.[391] More recently, while discussing exclusive dealing arrangements in *Jefferson Parish,* Justice O'Connor reiterated that "[e]xclusive dealing is an unreasonable restraint on trade only when a *significant fraction* of buyers or sellers are frozen out of a market by the exclusive deal."[392] In general, if less than ten percent of the relevant market is foreclosed, then competition has not been substantially lessened.[393]

The phrase "substantially lessen competition" should mean the same thing when applied to both tying arrangements and exclusive dealing arrangements given the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."[394] Additionally, it is inconceivable that Congress, in enacting a section that proscribes two trade restraints, intended the same three words (used but once in the section) to mean "dollar value, not market share" when applied to one restraint and "market share, not dollar volume" when applied to the other

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[391] This standard makes sound economic sense because market share, rather than dollar volume, is the appropriate measurement for effect on competition. *See supra* notes 227–34 and accompanying text.

[392] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) (emphasis added).

[393] *See, e.g.*, Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1234 (8th Cir. 1987) (8% to 10% market foreclosure is insufficient); *In re* Beltone Elecs. Corp., 100 F.T.C. 68, 184 (1982) (7% to 8% market foreclsoure is insufficient); *see also* Department of Justice Vertical Restraints Guidelines, 50 Fed. Reg. 623-03, 6,268 n.24 (1985) (a safe harbor exists for 10% or less).

[394] Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 230 (1993) (citations omitted); *see also* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) (there is a "natural presumption that identical words used in different parts of the same act were intended to have the same meaning"). The argument is even stronger in this instance given that the identical words—"substantially lessen competition"—are not used in different parts of the same act but are used only once. If the same phrase used twice must have one meaning, then clearly a phrase used once should only have one meaning. Despite these well-established rules of statutory constructions a half a century ago, the Court hinted at justifying divergent interpretations for the same single clause when it suggested that:

> [E]ven though the qualifying clause of § 3 is appended without distinction of terms equally to the prohibition of tying clauses and of requirements contracts, pertinent considerations support, certainly as a matter of economic reasoning, varying standards as to each for the proof necessary to fulfill the conditions of that clause.

Standard Oil Co. v. United States, 337 U.S. 293, 307–08 (1949). At most, this should justify the use of different evidence for each type of restraint, for example the length of term of requirements contract, *see id.*, which would normally be inapplicable to a tying case.

restraint.[395]

For a tying arrangement to violate Section Three, it must *substantially lessen competition* by foreclosing a substantial share of the market.[396] This is a higher threshold than is currently used in Section One tying cases, which require only that a *not insubstantial dollar volume* of commerce be affected. Even if "substantial" and "not insubstantial" mean the same thing, Clayton Section Three and Sherman Section One case law are dealing in different units of currency. The Clayton Act measures injury to competition in market share; the Sherman Act examines dollar figures.[397] Utimately, the Section Three test for tying liability is more stringent than the Section One test.[398]

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395 There is certainly no evidence of a congressional intent for the phrase "substantially lessen competition" to measure injury to competition in market share for excessive dealing arrangements and in dollar volume for tying arrangements.

396 *See Standard Oil Co.*, 337 U.S. at 314 ("[T]he qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected[.]").

397 *See supra* notes 218–21 and accompanying text.

398 Some commentators have argued that Section One and Section Three standards are the same. For example, Professor Areeda argues that the "unreasonable" test of Section One and the "substantial lessening of competition" test under Section Three should be considered identical standards. *See, e.g.*, 2 AREEDA, *supra* note 181, at 7. But this downplays the actual text and application of the Section One test, in which a plaintiff need only show that a not insubstantial volume of the tied product be affected. While Section Three's substantial lessening of competition standard is not objective, it certainly requires more than ten thousand dollars in goods be affected or the loss of a single sale. Furthermore, the Section Three test measures effect on competition, rather than the mere dollar amount. At most, Section Three has simply been ignored and folded into Section One cases without discussion or justification. But that does not mean the standards are identical.

Initially, Section One of the Sherman Act and Section Three of the Clayton Act employed divergent standards, with Section Three being the easier test for plaintiffs to satisfy. This makes sense in that "§ 3 of the Clayton Act was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act. . . ." *Standard Oil Co.*, 337 U.S. at 297 & n.4 (stating that Congress proscribed tying arrangements under Section Three because the Court had held them "not to be in violation of the Sherman Act"). An examination of early Supreme Court cases shows that Section One originally imposed a higher threshold for liability than Section Three. For example, in *United Shoe II*, 258 U.S. 451 (1922), the court found a tie-in illegal pursuant to Section Three of the Clayton Act, but not the Sherman Act. (The Court in *United Shoe II* held that *United Shoe I* was not res judicata because *United Shoe I* was governed by the Sherman Act, not by the Clayton Act, while *United Shoe II* was brought under the Clayton Act. *See id.*).

Thus, Congress originally intended Section One and Section Three to entail different standards—Section Three being the lower threshold. *Standard Oil Co.*, 337 U.S. at 312.

That Section One has evolved to a lower test for liability than Section Three provides an independent argument for why unilateral tying arrangements should not fall within Section One: current Section One tying case law renders Section Three of the Clayton Act's tying provision superfluous. If unilaterally imposed tying arrangements violate Section One (and its lower threshold for liability), there is no need for Section Three.[399] The Clayton Act is an amendment to the Sherman Act, intended to shore up the inadequacies of the latter.[400] As a general rule, statutes should not be read to render amendments superfluous, in the same way individual statutes are not to be read such that a word or clause is without moment.[401] Interpreting Section One to reach any unilaterally imposed tying

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> It seems hardly likely that, having with one hand set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as requiring.

Id.; *see also* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 608–09 (1953).

Since then, there has been an evolution in which the Clayton Act, which was intended to be the more powerful weapon against tying arrangements, has been surpassed by the easier-to-satisfy not insubstantial test of Section One of the Sherman Act. It is far easier to establish an illegal tying arrangement under Section One because the plaintiff does not have to prove that competition has been substantially lessened, as she would under Section Three. Section One dramatically lowers the threshold for the competitive impact a plaintiff must prove in order to invalidate a tying arrangement. *See generally* Lazaroff, *supra* note 278, at 144–45 n.257 (arguing that the Sherman and Clayton Acts employ different standards, the latter representing a lower threshold for liability).

[399] It is difficult to understand why a rational plaintiff would plead a Section Three claim, except to piggyback on a Section One claim. Further evidence that Section One jurisprudence has undermined the utility of Section Three is seen in the fact that, while plaintiffs routinely plead a Section One tying claim without asserting a Section Three claim, no rational plaintiff would rely solely on a Section Three tying claim without also alleging a Section One violation.

[400] *See supra* notes 181–85 and accompanying text.

[401] *See supra* notes 129–31 and accompanying text (arguing a contract is not necessarily a contract in restraint of trade). Anticipating such an argument, Professor Areeda argues that "the 1914 Congress did not enact a freeze on Sherman Act development." 2 AREEDA, *supra* note 181, at 8. While it is true that case law would continue to define and regulate emerging forms of anticompetitive conduct, that does not give federal courts license to ignore the Clayton Act and condemn conduct that Congress made a conscious decision not to prohibit, such as unilateral tying arrangements that do not substantially lessen competition or tend toward monopoly. Professor Areeda argues that "Clayton Act provisions can be superfluous today without being historically irrelevant." *Id.* But under Professor Areeda's—and most courts'—reading, the Clayton Act is both superfluous and historically irrelevant because those unilateral tying arrangements that Congress chose not to invalidate (those that do not substantially lessen competition) nonetheless form the basis of antitrust liability under Section One. Finally, analyzing tying arrangements under Section Three of the Clayton Act does not freeze the development and evolution of antitrust law. Concerted tying arrangements can be

arrangement with a greater than de minimis effect on competition undermines the protection that Congress afforded to those tying arrangements that do not substantially lessen competition.[402] Characterizing a challenged restraint as a tying arrangement under Section One is basically an attempt to circumvent the more rigorous standards of Section Three of the Clayton Act.[403]

Section Three advances a more appropriate standard for evaluating unilateral tying arrangements than does current Section One tying law. By proscribing unilaterally imposed tying arrangements that affect a not insubstantial dollar volume of commerce—without inquiry into market share or actual competitive effects—Section One prohibits tying arrangements that may actually facilitate competition in the tied product market and may be desired by consumers. This means that harmless or beneficial unilateral tying arrangements can be condemned under Section One of the Sherman Act, In contrast, if unilateral tying arrangements were dealt with solely under Section Three of the Clayton Act, the plaintiff would have to show that the tying arrangement "*substantially lessen*[*ed*] *competition or tend*[*ed*] *to create a monopoly*." Thus, benign and competitively beneficial unilateral tying arrangements would be permitted while those that harm competition would not.

In addition to representing a higher—and more appropriate—threshold for liability than Section One of the Sherman Act, Section Three of the Clayton Act also reflects a lower—and again, more appropriate—threshold for liability than Section Two of the Sherman Act. Evaluating unilaterally imposed tying arrangements under Section Two would restore doctrinal consistency to tying law. However, this consistency would be at the cost of permitting some anticompetitive tying arrangements because Section Two does not "kick in" until monopoly is threatened.[404] Section Three minimizes the cost of wholesale reliance on Section Two because Section Three has a lower threshold for liability than Section Two.[405] While a unilateral tying arrangement does not violate

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analyzed under the lower standard of liability found in Section One case law. Tying arrangements involving services can be found liable under the higher standard of liability contained in Section Two.

[402] *See Standard Oil Co.*, 337 U.S. at 301 (noting that Section Three "was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial") (citation omitted).

[403] This also simultaneously circumvents the significantly higher requirements of Section Two of the Sherman Act.

[404] *See supra* notes 382–83 and accompanying text.

[405] While unilaterally imposed tying arrangements do represent unilateral conduct, it makes sense to evaluate them under a lower standard of liability because, unlike other forms of Section Two conduct, Congress passed a specific statute to proscribe them. Congress believed that a tying arrangement should be prohibited whenever the tie-in substantially lessens competition.

Section Two until it creates a dangerous probability of monopolization, the same tie-in would violate Section Three once it affects a substantial share of the market.[406]

In sum, current tying law under Section One of the Sherman Act overproscribes tying arrangements because it reaches those beneficial and benign tie-ins that are, in effect, a form of competition[407]—and it does so while creating significant rifts in doctrinal consistency. Section Two protects doctrinal consistency but proscribes too few tying arrangements, permitting tie-ins that may substantially lessen competition but do not create a dangerous probability of monopolization of the tied product. Finally, Section Three of the Clayton Act restores doctrinal consistency while still invalidating those tying arrangements that substantially lessen competition; it neither proscribes beneficial and benign tie-ins nor does it wait for a tie-in to risk actual monopolization before stepping in. In short, it restores doctrinal consistency at the right price.

VI. DEVELOPING MEANINGFUL TESTS FOR EVALUATING TYING ARRANGEMENTS

Breathing life back into Section Three of the Clayton Act does not eliminate the Sherman Act as a basis for liability in tying cases. If a tying arrangement is the result of concerted action, the plaintiffs may still bring suit under Section One of the Sherman Act, which has a lower threshold for liability than Section Three.[408] Section Two of the Sherman Act remains important because Section Three cannot reach tie-ins involving noncommodities.[409]

At this point, it should be clear that there is a fundamental distinction between concerted and unilaterally imposed tying arrangements. Because concerted tying arrangements are, by definition, concerted action, they should be analyzed under Section One of the Sherman Act. Under Section One, a concerted tying arrangement should be condemned only if it is determined to be unreasonable, using either per se or Rule of Reason analysis. In contrast, a unilaterally imposed tying arrangement is, by definition, unilateral. Thus it should be evaluated under Section Two of the Sherman Act or Section Three of the Clayton Act and condemned only if it threatens actual monopolization or substantially lessens competition, respectively.

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[406] *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961); *see also supra* note 391 and accompanying text.

[407] *See supra* notes 346–56 and accompanying text.

[408] This is appropriate because a concerted tying arrangement is more deleterious than a unilaterally imposed tying arrangement. *See supra* notes 61–65 and accompanying text.

[409] *See supra* note 232 (noting that the Clayton Act is limited to contracts for "goods, wares, merchandise, machinery, supplies or other commodities").

Proper differentiation of tying arrangements as either concerted or unilateral is the first step in bringing clarity to tying law and consistency to antitrust law. After characterizing a tying arrangement as either concerted or unilateral, the court should apply the appropriate test to determine whether the challenged tying arrangement injures competition. Part VI lays out legal tests to evaluate tie-ins, depending on whether the tying arrangement is concerted or unilaterally imposed.

A. *Concerted Tying Arrangements*

Concerted tying arrangements should continue to be evaluated under Section One of the Sherman Act. Because only concerted tie-ins would remain in Section One, there is no need to employ a unique tying test, as is currently done. Rather, the standard Section One framework that is applied to all non-tying violations can now be applied to tying claims as well.

The plaintiff would first have to prove the existence of an agreement between two or more defendants, other than the ultimate contract with the buyer. The plaintiff could show an agreement between two competitors that have agreed to tie two products together, between the seller of the tying good and the seller of the tied good, or between a dominant seller and alternative suppliers.[410] As with all nontying Section One causes of action, such an agreement could be inferred from circumstantial evidence if two competitors simultaneously impose similar tying arrangements or if two businesses appeared to cooperate in some other fashion.[411] When there are separate sellers of the tying and tied products, it may be relatively easy to infer concerted action. For example, if Seller A announces that he refuses to sell Product X unless the consumer also buys Product Y from Seller B, it may be difficult for A and B to assert that they have not coordinated the allegedly "unilateral policy" of Seller A. Nonetheless, an explicit finding of an agreement must be made before the court proceeds to consider whether the tying arrangement is unreasonable under Section One of the Sherman Act.

Having proven an agreement, the plaintiff would next have to prove that the tying arrangement at issue was unreasonable. Whether the concerted tie-in is evaluated under per se rules or the Rule of Reason should be a function of whether the tying arrangement results from a horizontal or vertical agreement. A horizontal tying arrangement exists when businesses that should (or could) be competing in the market for the tying product, the tied product, or both products,

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410 *See supra* notes 37–62 and accompanying text.

411 *See* American Tobacco Co. v. United States, 328 U.S. 781, 789 (1946); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939).

jointly agree to impose a tying arrangement. This form of concerted tying arrangement should be per se illegal because it can have the same effect as price fixing.[412] Similarly, when the concerted tying arrangement operates as a concerted refusal to deal or a concerted boycott, then it should be treated under per se rules.[413]

However, not all concerted tying arrangements are horizontal. For example, when a business that sells one product and another business that sells a non-competing product agree to bundle their products, the agreement is not horizontal.[414] The businesses are not in competition with each other; they sell different (and presumably, complementary) products. As with most nonprice trade restraints, this tying arrangement should be judged less harshly than a horizontal tying arrangement. In other words, such a concerted tying arrangement should be evaluated under the Rule of Reason.

Whether per se or Rule of Reason analysis is employed, some of the key elements that are currently applied in the Section One test for tying are no longer necessary. First, there is no need to prove two separate products, because a rule against concerted tying arrangements is not concerned with leveraging power from one market to another. Rather, it is concerned with the combination of two business entities acting together to decrease consumer choice or increase prices charged to consumers.

Second, there is no need to show coercion in cases of concerted tying arrangements, because the purpose for the coercion requirement is no longer present. The coercion requirement is currently necessary to bring unilaterally imposed tying arrangements within Section One because tie-ins have to restrain trade in a way that voluntary sales contracts do not. This creates an anomaly in which the requisite agreement must be coerced.[415] But under a mature tying regime that recognizes the difference between unilateral and concerted ties, the agreement requirement for concerted tying arrangements is satisfied by proving the first element of any Section One claim—namely joint activity between two businesses directed at another business or consumers.

Third, for those concerted tying arrangements evaluated under per se rules, there is no need to show market power. Just as traditional price fixing and concerted boycott schemes are condemned without inquiry into market power, horizontal concerted tying arrangements should be similarly condemned. In

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[412] *See supra* notes 37–42 and accompanying text.

[413] Such a position finds tacit support in *International Salt*, which applied per se analysis to tying arrangements, because the *International Salt* Court relied on *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1947), which was a concerted boycott case. *See generally* International Salt Co. v. United State, 332 U.S. 392 (1947).

[414] *See supra* notes 47–59 and accompanying text.

[415] *See supra* notes 203–10 and accompanying text.

contrast, inquiry into market power may still be pertinent for cases of vertical concerted tying arrangements.[416] This is consistent with the fact that market power is a relevant factor under the Rule of Reason for other vertical restraints.

Finally, the plaintiff would have to prove an effect on interstate commerce and the existence of causal antitrust injury. If a plaintiff can establish these elements, then she has made out a prima facie violation of Section One based on a concerted tying arrangement. In short, the process for evaluating concerted tying arrangements employs the same test used to evaluate all other Section One violations. The net result: doctrinal consistency.

B. *Unilateral Tying Arrangements*

A tying arrangement that is unilaterally imposed by a single buyer could be analyzed under either Section Three of the Clayton Act or Section Two of the Sherman Act, depending on what is being tied together. Since Section Three is limited to tying arrangements involving two commodities, it cannot reach tying arrangements involving services,[417] land,[418] and intellectual property.[419]

To prevail under either Section Two or Section Three, a plaintiff would first have to prove that the defendant had monopoly power in the relevant market. In the case of a challenged tying arrangement, the relevant product market is the market for the tying product because that is the source of the alleged market power. As in any Section Two case, the plaintiff would have to define the contours of the relevant market and show why the defendant has monopoly power in that market.[420]

After establishing monopoly power, the plaintiff would have to prove that the defendant engaged in anticompetitive conduct. It is not uncommon for many

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416 Because the parties effecting the tie-in are not competitors, their concerted action does not increase their market power in any market. Whether their concerted tie-in has any effect on competition will be a function of the pre-existing market power of the supplier of the tying product. In contrast, when competitors jointly agree to impose a tying arrangement, they do increase their shared market power over the tying product. This is inherently anticompetitive and, like horizontal price-fixing, can be condemned as a category of trade restraint that always or almost always tends to decrease competition.

417 *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461–63 (1992).

418 *Cf.* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 521 (1969) (Fortas, J., dissenting) (noting that *Northern Pacific* had to be brought under the Sherman Act because the Clayton Act does not apply to land).

419 *See, e.g.*, Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (trademark).

420 The plaintiff would also have to demonstrate the relevant geographic market, but that inquiry is not meaningful for our purposes.

types of traditional Section Two conduct to have their own unique set of elements, all of which must be shown in order to satisfy the second prong of a monopolization claim.[421] In order to satisfy the second prong of a monopolization claim based on tying as the anticompetitive conduct, a plaintiff should be required to prove three elements.

First, there must be two products. If there are not, a monopolist could simply be charging a supra-competitive price for what is essentially one product, something she is permitted to do under antitrust law. Presumably the tying product has already been defined in establishing the first prong of monopoly power. Courts may also define the market for the tied product in order to gauge whether the defendant has achieved market power in the target market. However, the "two-product inquiry" is slightly different than traditional Section Two market definition in that the court must explicitly find that there is separate consumer demand for each product, a finding not necessary in Section Two litigation involving one product. Similar analysis is appropriate under Section Three. In enacting the Clayton Act, Congress was concerned about monopolists leveraging market power from one market to another, a problem manifested only when there are two products.

Second, under either Section Two of the Sherman Act or Section Three of the Clayton Act, the plaintiff must show that the monopolist imposed the tie-in by means of force or coercion. The coercion requirement insures that a monopolist is not punished for a tying arrangement that the consumer actually desired, and perhaps even requested.[422] Thus, every bundling of goods does not automatically subject the seller to liability, and consumer-driven bundling is allowed to continue.

Third, the plaintiff will have to show an effect on competition. If the plaintiff is proceeding under Section Three, she will have to prove that the tying arrangement substantially lessens competition. This should be done through a market share analysis. If the plaintiff cannot utilize Section Three and must instead rely on Section Two, she would have to show monopolization of the tied product market as a result of the unilaterally imposed tying arrangement.[423] This will no doubt be the hardest element to meet in most cases. To the extent that a plaintiff may have difficulty proving actual monopolization of the tied product,

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421 *See supra* note 324 and accompanying text.

422 This rationale also applies to unilaterally imposed tying arrangements currently evaluated under Section One. One major difference is that the consumer does not have to accede to this coercion in order to have a claim because there is no agreement requirement under Section Two.

423 Monopoly power over the tying product has already been shown in the first prong of the monopolization test.

she can plead a cause of action for attempted monopolization.[424]

If these elements are shown, then the plaintiff has made out a prima facie case against the unilaterally imposed tying arrangement under either Section three of the Clayton Act or Section Two of the Sherman Act.[425] Note, the court is not punishing the monopoly in the tying product market. It is merely an element of the claim. If the plaintiff believes that the defendant has improperly acquired or maintained a monopoly over the tying product, she may allege a separate Section Two violation.

After a plaintiff has established a prima facie case of monopolization based on tying, a defendant should still be permitted to argue that the tie-in is justified by legitimate business reasons. Such a defense currently exists in tying law. Potential justifications include maintaining consumer goodwill[426] and eliminating free-riding.[427]

C. *Whether to Plead a Section One, Section Two, or Section Three Tying Arrangement*

As with many trade restraints, a plaintiff can plead both a concerted and a unilateral tying arrangement. If the plaintiff can prove that the tying arrangement is the result of concerted action, the arrangement will be evaluated under Section One and held illegal if it is deemed unreasonable. If the plaintiff fails to prove the existence of an agreement, the tying arrangement would instead be considered under Section Two of the Sherman Act or Section Three of the Clayton Act. The plaintiff would be afforded the opportunity to show that the tie-in substantially lessens competition (for a Section Three cause of action) or creates a dangerous probability that the defendant would monopolize the market for the tied product (for a Section Two cause of action). In a sense, the plaintiff gets two bites at the apple, but this is common in litigation in which plaintiffs assert multiple causes of action, knowing that some may be dismissed or lose at summary judgment. Of course, plaintiffs without a viable agreement theory should only plead a Section Three or Section Two tying arrangement. Plaintiffs who can show neither an

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[424] To prevail on a claim of attempted monopolization, a plaintiff must show anticompetitive conduct, a specific intent to monopolization, and a dangerous probability of success. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 453 n.4 (1993).

[425] Note that "sufficient economic power" over the tying product is no longer part of the substantive tying test because it has been folded into the monopoly power element inherent in all Section Two monopolization claims.

[426] *See* Mozart Co. v. Mercedes Benz of N. Am., Inc., 833 F.2d 1342, 1348–51 (9th Cir. 1987).

[427] Professor Alan Meese provides such a rationale for allowing tie-ins in the franchise context. *See generally* Meese, *supra* note 262.

agreement nor substantial lessening of competition would do best to find another cause of action or to forego litigation altogether.

VII. CONCLUSION

Antitrust laws in general—and the Sherman Act in particular—are concerned with two issues: concerted action by competitors and anticompetitive conduct by monopolists. Unilaterally imposed tying arrangements by a nonmonopolist implicate neither of these concerns. Tying arrangements are dangerous in two instances: if there is concerted action between competitors or if a unilaterally imposed tying arrangement substantially lessens competition in the tied market. Antitrust liability should be limited to these situations, lest zealous competition be prohibited in the name of protecting competition.

Treating a single contract between a buyer and seller as illegal concerted action runs ramshod over the body of antitrust law that has consistently and consciously sought to afford greater protection to unilaterally imposed restraints. To end the inquiry into concerted action as soon as one finds a contract misconstrues the purpose of the concerted action requirement—namely, that businesses should not concentrate their market power against their competitors or their customers. To maintain its legitimacy and consistency, antitrust law must elevate substance over form. The search for substance should consider the nature of the parties to the challenged contract. After all, the marriage between a seller and a buyer that marks every sale is fundamentally different from an assignation between competitors.

The ultimate goal of this Article is to start a discussion about the nature of tying arrangements and their place in the overall structure of the American antitrust framework. While there are certainly arguments for evaluating unilaterally imposed tying arrangements under Section One, they should be made explicitly by courts and supporters of the status quo. Neither silence nor inertia are persuasive arguments for preserving the current treatment of tying arrangements given the harm done to doctrinal consistency by treating conduct that is essentially unilateral as though it were concerted. Whatever the outcome, antitrust doctrine can only be clarified and improved by a spirited debate over the nature of tying.